AUGUST, 1957
Volume 2, Number 4

Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

VANDERBILT UNIVERSITY SCHOOL OF LAW

VANDERBILT UNIVERSITY
SCHOOL OF LAW

HARVIE BRANSCOMB, B.A., M.A. (OXON.), PH.D. LITT. D., D.H.L., *Chancellor*
CHARLES MADISON SARRATT, M.A., D.C.L., LL.D., *Vice-Chancellor*
JOHN H. STAMBAUGH, *Vice-Chancellor in Charge of Business Affairs*
WILLIAM O. BATTS, JR., B.A., M.A., *Acting Dean of Students*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Dean of the School of Law*
KATHLEEN B. LEONARDT, B.A., *Registrar and Administrative Assistant to the Dean*

PAUL J. HARTMAN, A.B., LL.B., LL.M., JUR. SC. D., *Professor of Law*
EDMUND M. MORGAN, A.B., A.M., LL.B., *Frank C. Rand Professor of Law*
F. HODGE O'NEAL, A.B., LL.B., J.S.D., S.J.D., *Professor of Law*
THOMAS G. ROADY, JR., A.B., M.A., J.D., *Professor of Law*
PAUL H. SANDERS, A.B., LL.B., *Professor of Law*
HERMAN L. TRAUTMAN, B.A., LL.B., *Professor of Law*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Professor of Law*
THOMAS F. GREEN, JR., A.B., LL.B., J.S.D., *Visiting Professor of Law*
JAMES B. EARLE, LL.B., *Assistant Professor of Law*
JOHN HOWARD MOORE, A.B., J.D., *Professor of Law Emeritus*

J. PASCHALL DAVIS, A.B., LL.B., *Lecturer in Law*
W. RAYMOND DENNEY, LL.B., *Lecturer in Law*
WILLIAM J. HARBISON, B.A., LL.B., *Lecturer in Law*
EDWIN F. HUNT, B.A., LL.B., *Lecturer in Law*
WILLIAM E. MILLER, A.B., LL.B., *Lecturer in Law*
CECIL SIMS, LL.B., *Lecturer in Law*
SAMUEL E. STUMPF, B.S., B.D., PH.D., *Lecturer in Jurisprudence*
ROBERT W. STURDIVANT, LL.B., *Lecturer in Law*
WILLIAM WALLER, B.S., LL.B., *Lecturer in Law*

EUGENE G. WYATT, JR., B.A., LL.B., *Associate Director, Race Relations Law Reporter*

BETTY BENSON, *Assistant Secretary to the Race Relations Law Reporter*
JANE OLIVER GREEN, B.A., B.L.S., *Secretary to the Law Review*
MARY ELIZABETH POLK GREEN, B.A., LL.B., *Assistant to the Director of the Law Library*
ANN INGRAM, *Secretary to the Race Relations Law Reporter*
CARRIE L. PAGE, *Secretary to the Dean*
ALLEYNE L. SUTHERLAND, *Secretary to the Faculty*
PAULINE F. WOODARD, *Assistant to the Director of the Law Library*

Bulletin or other information will be supplied on request. Write Vanderbilt University, School of Law, Nashville 5, Tennessee.

Recent Developments . . . A Summary

Education

PUBLIC SCHOOLS: Statewide integration of schools in *Delaware* has been ordered by the federal district court in that state (p. 781). This order emerged from the consolidation of seven cases filed in that state by Negro school children against various local school officials and the State Board of Education. The court not only ordered admission to the specific schools named in the suit, but also directed the State Board to present a plan accomplishing desegregation of all schools in the state by the fall, 1957, term.

Two *Florida* cases involved the "Pupil Assignment Law" in that state. In one case the United States Court of Appeals for the Fifth Circuit reversed and remanded a district court decision which had denied relief to Negro plaintiffs (p. 784). The denial of relief had been on the ground that application to a particular school had not be denied. The Court of Appeals, however, stated that such an application was not required nor was it requisite that procedures under the *Florida* act be exhausted where a policy of non-integration had been adopted by local officials. In the other *Florida* case the denial by a local board of a transfer of a Negro pupil to a "white" school was upheld by the federal district court as not based on racial grounds (p. 785).

In *Maryland* a plan by one county for gradual integration based on classroom availability and other factors was approved by the federal district court (p. 787). The Court of Appeals for the Fifth Circuit, acting for the second time on the Dallas, *Texas*, case, declared that "faith . . . without works, is not enough," and directed that desegregation be undertaken "with all deliberate speed" (p. 805). The Court of Appeals for the Fourth Circuit affirmed a decision of a federal district court which had held the *Virginia* Pupil Placement Act to be unconstitutional and directed the admission of Negro children to schools in Newport News and Norfolk (p. 808). The decree of a federal district court requiring the integration of schools in Arlington County, *Virginia*, was revised to require immediate integration (p. 810).

The conviction of John Kasper for violation of a restraining order against interfering with the integration of a high school in Clinton, *Tennessee*, was upheld on appeal to the Court of Appeals for the Sixth Circuit (p. 792). In another case arising out of the same situation, Kasper and six other defendants were convicted in a federal district court (p. 795).

PRIVATE SCHOOLS: The "Girard College Case" was returned, by a divided *Pennsylvania* Supreme Court, to a lower state court for "further proceedings" (p. 811).

TEACHERS: The United States Supreme Court dismissed as moot (p. 777) an appeal by Negro School teachers in *South Carolina* from a decision of a three-judge federal district court involving the unconstitutionality of a *South Carolina* act prohibiting the employment of members of the NAACP as teachers, following the repeal of the act in question (p. 852).

Housing

In response to a suit brought by Negroes in federal district court, the Louisville, *Kentucky*, Municipal Housing Commission evolved a plan, approved by the court, for the elimination of racial segregation in public housing over a period of a year (p. 815). The city of Los Angeles, *California*, enacted an ordinance designed to eliminate racial or religious discrimination in leases and deeds entered into by its Community Redevelopment Agency (p. 844). The Supreme Court of *Tennessee* has held that there is no right of action for damages to adjacent landowners caused by the sale of property in a "white" neighborhood to Negroes (p. 834). The constitutionality of an act prohibiting discrimination in publicly-assisted housing in *Washington* was considered by the Attorney General of that state (p. 878).

Parks, Golf Courses

. The decision of a federal district court in *North Carolina* requiring the admission of Negroes to a golf course in Greensboro which

had been leased to a private operator was upheld by the Court of Appeals for the Fourth Circuit (p. 817). The previous conviction of some of the plaintiffs in that case by a state court for criminal trespass on the golf course was reversed by the *North Carolina* Supreme Court on technical grounds (p. 818). Also in *North Carolina* the city attorney of Durham prepared legal opinions concerning admission policies to a city-owned athletic park (p. 877) and the effect of racial integration on certain property obtained by the city under restrictive deeds (p. 874).

Employment

City ordinances concerning fair employment practices have been enacted in San Francisco, *California*, (p. 846) and amended in East Chicago, *Indiana*, (p. 852). A 1956 *South Carolina* act which prohibited the employment of members of the NAACP by state or local school authorities was repealed (p. 852). Racial discrimination in employment by an airline was the basis of a complaint before the *New York* State Commission Against Discrimination in which probable cause has been found in a preliminary hearing (p. 867).

Elections

Allegation of discriminatory application of a literacy test by a registrar in *North Carolina* was made in a suit in federal district court in that state (p. 832). The proceeding was stayed pending the exhaustion of state judicial and administrative remedies. A *Utah* case in which the state supreme court had ruled adversely to the voting rights of Indians residing on reservations was vacated and remanded as moot by the United States Supreme Court (p. 778).

Other Developments

The conviction of two out of six defendants in an *Illinois* state court for disorderly conduct, involving efforts by an interracial group to secure service in a tavern, was affirmed by the state Appellate Court (p. 821). Parliamentary procedures in a move to admit Negro attorneys to the Bar Association of the *District of Columbia* were the subject of a suit in federal district court there (p. 837). The state of *Vermont* has enacted an anti-discrimination act (p. 846). *South Carolina* has enacted laws defining and punishing the crime of barratry (p. 854), and conferring emergency powers on the governor (p. 855). The proper payment of fees to attorneys defending integration suits brought in *Delaware* was the subject of an opinion by that state's Attorney General (p. 871).

Reference

A three-year survey of the principal legal developments in the field of race relations since the 1954 Supreme Court decision in the *School Segregation Cases* is included in this issue (p. 881). The survey is keyed to materials previously published in RACE RELATIONS LAW REPORTER. Also included are a supplemental bibliography (p. 913) and a cumulative table of cases for Volume 2 (p. 919).

The *Race Relations Law Reporter* is published six times a year, February, April, June, August, October, and December, by Vanderbilt University School of Law, Nashville 5, Tennessee. Entered as second-class matter February 24, 1956 at the post office at Nashville, Tenn., under the Act of March 3, 1879. Subscription price $3.00 per year; two years, $5.00. If purchased separately $1.00 per regular issue. Printed by Rich Printing Co., 150 10th Ave., N., Nashville, Tennessee.

TABLE OF CONTENTS

RACE RELATIONS LAW SURVEY: A review of the legal developments since the May, 1954, school cases.

Page 881.

UNITED STATES SUPREME COURT

EDUCATION
School Teachers—South Carolina

Ola L. BRYAN et al. v. M. G. AUSTIN, Jr., as Superintendent of School District No. 7 of Orangeburg County, South Carolina, et al.

United States Supreme Court, June 24, 1957, 354 U.S. 933, 77 S.Ct. 1396.

SUMMARY: Seventeen Negro public school teachers in South Carolina brought an action for a declaratory judgment and an injunction in a federal district court against local school officials. The action sought a declaration that a state statute (Act No. 741, 1956, 1 Race Rel. L. Rep. 751) making unlawful the employment by the state or any local school district of the state of any member of the National Association for the Advancement of Colored People, was unconstitutional and void and to enjoin the enforcement of the statute. A three-judge district court was convened to hear the case. The court filed a per curiam order staying the proceedings pending the exhaustion of state administrative and judicial remedies. 148 F.Supp. 563, 2 Race Rel. L. Rep. 378 (E.D. S.C. 1957). The plaintiffs appealed this ruling to the United States Supreme Court. While the appeal was pending, Act No. 741, 1956, was repealed by Act No. 223, 1957 (p. 852, *infra*). The Supreme Court vacated the judgment as moot because of the repeal of the act and remanded the case to the district court.

PER CURIAM.

In view of the repeal of South Carolina Act No. 741 of 1956 by Act No. 324 of 1957 after the decision below, D.C., 148 F.Supp. 563, the cause has become moot. Accordingly, the judgment of the District Court is vacated and the case is remanded to it, with leave to the appellants to amend their pleadings either to safeguard any rights that may have accrued to them by virtue of the operation of the repealed Act or to set forth a cause of action based on the operation of the new Act. Rule 15 of the Federal Rules of Civil Procedure.

TRIAL PROCEDURE
Grand Juries—Louisiana

Freddie EUBANKS v. State of LOUISIANA.

United States Supreme Court, June 24, 1957, 354 U.S. 934, 77 S.Ct. 1407.

SUMMARY: The petitioner, a Negro, was convicted of murder in a Louisiana state court and sentenced to death. He appealed to the Louisiana Supreme Court on the ground, among others, that the trial court had erred in refusing to quash the indictment on which he was tried. The motion to quash had been made on the basis that there had been a systematic exclusion of Negroes from the grand jury which indicted and that this constituted a deprivation of rights secured to the defendant by the Fourteenth Amendment to the Constitution. The Louisiana Supreme Court found that the evidence did not support the contention of

systematic exclusion, (p. 825, *infra*). A petition for writ of certiorari was filed with the United States Supreme Court. That court, in an interim order, ordered a stay of execution of the sentence pending disposition of the writ of certiorari.

It is ordered that execution of the sentence of death imposed upon the petitioner be, and the same is hereby, stayed pending final disposition of the petition for writ of certiorari. In the event certiorari is granted, this stay is to continue until final disposition of the case.

ELECTIONS
Voting—Utah

Preston ALLEN, for himself and other American Indians similarly situated, v. Porter L. MERRELL, individually and as County Clerk, Duchesne County, Utah.

United States Supreme Court, April 22, 1957, No. 534, 353 U.S. 932, 77 S.Ct. 809.

SUMMARY: An American Indian residing on a reservation in Utah brought a proceeding as a class action in the Utah Supreme Court against a Utah county clerk seeking to require the clerk to issue him a ballot and permit him to vote. The clerk's refusal to allow the petitioner to register and vote was based on a Utah statute which provides that residents of Indian reservations are not considered residents of Utah for voting purposes unless a prior residence elsewhere in the state has been established. The petitioner contended that this provision was violative of his rights under Art. IV, Sec. 2 and the Fourteenth and Fifteenth Amendments to the Constitution. In an opinion issued on October 25, 1956, the court upheld the statutory proscription as valid. 1 Race Rel. L. Rep. 1067. On December 29, 1956, the court issued a supplemental opinion, holding that a separate classification of reservation Indians with an accompanying limitation of voting rights is based on reasonable grounds and is not a denial of the right to vote on racial grounds. 305 P.2d 490, 2 Race Rel. L. Rep. 166 (Utah 1956). The United States Supreme Court granted certiorari. A motion to vacate the judgment and remand the case to the Utah Supreme Court was granted upon stipulation of counsel that the case had become moot.

PER CURIAM.

The motion to vacate judgment is granted and the case is remanded to the Supreme Court of Utah for further proceedings in light of the stipulation of counsel that the cause is moot.

MISCELLANEOUS ORDERS
The United States Supreme Court:

Denied certiorari (i.e., declined to review) in the following cases:

Orleans Parish School Board v. Bush (Prior decision 242 F.2d 156, 2 Race Rel. L. Rep. 308 [5th Cir. 1957] in which the decision of a federal district court requiring admission of Negro students to schools in Orleans Parish, Louisiana, on a racially non-discriminatory basis and holding invalid a Louisiana "Pupil Placement Act" was affirmed by the Court of Appeals for the Fifth Circuit) 354 U.S. 921, 77 S.Ct. 1380, No. 980, June 17, 1957.

Thomas v. Florida (Prior decision 92 So.2d 621, 2 Race Rel. L. Rep. 657 [Fla. 1957] in which the Florida Supreme Court had found no support for a contention that racial discrimination was practiced by the jury in sentencing a Negro for rape.) 354 U.S. 925, 77 S.Ct. 1389, No. 807 Misc., June 17, 1957.

CASES DOCKETED

THE FOLLOWING cases have been docketed for review by the United States Supreme Court in its October, 1957, term. The docket numbers shown are for the new term.

Conley v. Gibson, No. 7; decision below at 229 F.2d 436, 1 Race Rel. L. Rep. 556; certiorari granted.

United States ex rel. Lee Kum Hoy v. Shaughnessy, No. 32; decision below at 237 F.2d 307, 2 Race Rel. L. Rep. 193; certiorari granted.

Reeves v. Alabama, No. 66; decision below at 88 So.2d 561, 1 Race Rel. L. Rep. 697; certiorari granted.

NAACP v. Alabama, No. 91; decision below at 91 So.2d 214, 2 Race Rel. L. Rep. 177; certiorari granted.

Payne v. Arkansas, No. 99; decision below at 295 S.W.2d 312, 2 Race Rel. L. Rep. 171; certiorari granted.

Florida ex rel. Hawkins v. Board of Control, No. 169; decision below at 93 So.2d 354, 2 Race Rel. L. Rep. 358.

Kasper v. Brittain, No. 315; decision below at 2 Race Rel. L. Rep. 792.

COURTS

EDUCATION
Public Schools—Delaware

Brenda EVANS, an infant, by Charles Evans, her guardian ad litem, et al. v. Madeline BUCHANAN, etc. Members of the State Board of Education, et al. [No. 1816]
Madeline STATEN et al. v. Madeline BUCHANAN et al. [No. 1817]
Julie COVERDALE et al. v. Madeline BUCHANAN et al. [No. 1818]
Eyvonne HOLLOMAN et al. v. Madeline BUCHANAN et al. [No. 1819]
David CREIGHTON et al. v. Madeline BUCHANAN et al. [No. 1820]
Marvin DENSON et al. v. Madeline BUCHANAN et al. [No. 1821]
Thomas J. OLIVER, Jr., et al. v. Madeline BUCHANAN et al. [No. 1822]

United States District Court, District of Delaware, July 15, 1957.

SUMMARY: Eight class actions were filed in federal district court in Delaware by Negro school children against members of the State Board of Education and various county and local school officials. In each case admission was sought to public schools in the state without discrimination on the basis of race or color. One case, involving Clayton School District No. 119 [*Evans v. Buchanan*, No. 1816], was prosecuted while the others were held in abeyance. In that case the local school officials moved to dismiss the action as to them on the grounds that the complaint failed to state a valid cause of action because it did not allege the absence of administrative impediments to the desegregation of the schools. The court reviewed the two decisions of the United States Supreme Court in the *School Segregation Cases* and stated that administrative impediments to the opening of public schools on a nondiscriminatory basis were not matters to be alleged by persons seeking admission but, on the contrary, were matters of mitigation which might be shown by school officials in indicating their good faith compliance with the constitutional mandate of the Supreme Court. The motion to dismiss was denied. 145 F.Supp. 873, 2 Race Rel. L. Rep. 7 (1956). Thereafter the plaintiffs moved for a summary judgment. In granting that motion the court reviewed the efforts of the State Board of Education, one of the defendants, to require the local board to present a plan for desegregation of the schools. The court stated that although the state board was apparently acting in good faith the local board had made no move toward such action. The court directed the local board to present to the state board, within thirty days, a plan for integration and directed the state board to submit its plan to the court within sixty days. 149 F.Supp. 376, 2 Race Rel. L. Rep. 301 (1957). The plaintiffs in seven of the cases then moved to consolidate those cases and for summary judgments. The court granted the motions. In its order the court directed the non-discriminatory admission of children to the specific schools named in the suits to be accomplished by the fall, 1957, school term. It also directed the State Board of Education to submit, by September 13, 1957, a plan for the desegregation of all schools in the state to be accomplished by the fall, 1957, term.

LEAHY, Chief Judge.

MEMORANDUM AND ORDER

1. Among the several motions before the Court are plaintiffs' motion for consolidation of C. A. Nos. 1816 through 1822, inclusive under FR 42(a), and plaintiffs' motion for summary judgment against the Members of the State Board of Education and the State Superintendent of Public Instruction under FR 56(a).

[*Order Effective in Evans Case*]

2. This Court disposed of a previous motion of plaintiffs for summary judgment with respect to C.A. No. 1816,[1] as to which an appeal was taken to the Court of Appeals for this Circuit but not legally prosecuted by the Local Board, in accordance with law and the Rules of said Court of Appeals. The time for filing a plan as to this particular school district, as provided for in the order entered by the Delaware District Court was continued, pending the appeal, until further order of this Court. The present order will be operative at to this Local Board for its failure to perfect its appeal.

3. Answers of defendant State Board and State Superintendent in all the Civil Actions pending are, in substance, similar. I find as to plaintiffs and other Negro children similarly situated, these answers acknowledge the existence of racial segregation in the Public Schools of Delaware;[2] and this is a deprivation of rights guaranteed under the Federal Constitution and so declared inviolate by the Supreme Court.[3]

[*Regulations of State Board*]

4. The State Board of Education adopted in the summer of 1954 regulations requiring the local school Boards to submit to the State Board plans for racial desegregation in the public schools. These regulations, especially as they affected the local Boards, had binding force throughout the State of Delaware.[4] This initiated a policy then regarded feasible. But, it is also manifest the local Boards, in Kent and Sussex Counties, in general, have not begun to comply with these regulations. The regulations of the State Board cannot be permitted to be wielded as an administrative weapon to produce interminable delay. In the interplay of forces resulting in continuing violation of plaintiffs' constitutional rights, these rights of Negro children must retain their vitality. They are, indeed, paramount.[5] The State Board, though not solely responsible for a solution of administrative procedures in this sociological-legal problem, must, in the final analysis, be held answerable.

5. The State Board of Education, from its past performance, blandly asserts it must await initial local action because the State Board "is not and can not be as conversant with local school problems as the local school Boards." The factual data contained in its Reports to the Governor of the State of Delaware refutes this. This Court readily understands the State Board, as to the problem of integration, is not as conversant with local problems as the local Boards, but the Court is in disagreement whether the State Board cannot be, or, when measured by its record of inaction in failing to negotiate a prompt and reasonable start toward full compliance, it has tried to be.

[*Duty of State Board*]

6. Clearly, it is best, in the abstract, to permit local conditions to be handled in the first instance by Local Boards for integration, as commanded by the Supreme Court of the United States. But, it is also recognized joint and not independent action is called for by all parties concerned. The first mandate of the Supreme Court fixed the law on this problem over three

1. See Evans, et al., v. Members of the State Board of Education, et al., D.C. Del., 149 F. Supp. 376.
2. C.A. No. 1816: Complaint, pars. 3, 6, 7, 8; Answer, pars. 3, 6, 7, 8.
   C.A. No. 1817: Complaint, pars. 8, 9, 10; Answer, pars. 8, 9, 10.
   C.A. No. 1818: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
   C.A. No. 1819: Complaint, pars. 3, 6, 7, 8; Answer, pars. 3, 6, 7, 8.
   C.A. No. 1820: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
   C.A. No. 1821: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
   C.A. No. 1822: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
3. Brown et al. v. Board of Education of Topeka, et al., 347 U.S. 483, 349 U.S. 294.
4. 14 Del. Code §122; Steiner, et al. v. Simmons, et al., Del., 111 A. 2d 274, 580, 583 (per C. J. Southerland).
5. See Belton, et al. v. Gebhart, et al. and Bulah, et al. v. Gebhart, et al. 32 Del. Ch. 343, 87 A. 2d 862, aff'd in Del. Ch. 144, 91 A. 2d 137, cert. granted in 344 U.S. 891, Misc. Order in 345 U.S. 972, aff'd in 347 U.S. 483, Misc. Order in 348 U.S. 886, and aff'd and remanded in 349 U.S. 294.
   At 87 A. 2d 864-865:
   > "Defendants say that the evidence shows that the State may not be 'ready' for non-segrated education, and that a social problem cannot be solved with legal force. Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore, his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principles is often distasteful to some citizens, but this is one reason for Constitutional guarantees. The principles override transitory passions."

years ago, the second mandate, over two years ago. Since that time no appreciable steps have been taken[6] in the State of Delaware to effect full compliance with the law.

[*Order Will Be State-wide*]

In conclusion, it is recognized, under the law as fixed by the Supreme Court of the United States, the right of plaintiffs to public education unmarred by racial segregation is immutable; that each state faces problems indigenous to its own circumstances; that circumstances in Delaware require racial desegregation to become a reality simultaneously throughout all communities; that the State Board exercises general control and supervision over all public schools in Delaware, including the Local Boards, and has knowledge of the status of racial desegregation in those schools; that the State Board's admissions of continued racial segregation in the public schools washes away all dispute as to this issue, as raised by the Local Boards; and, that any order by this Court directed to the State Board is, *a fortiori*, directed to any Local Board over which it, in turn, has authority.

It is hereby

ORDERED AND DECREED BY THIS COURT:

1. The motion of plaintiffs to consolidate the following causes, C.A. 1816 through C.A. 1822, inclusive, be and the same is hereby granted and all pending causes in this Court are hereby consolidated for judicial decision.

2. The plaintiffs' motions for summary judgment in C.A. 1816 through C.A. 1822, inclusive, as against the Members of the State Board of Education and the State Superintendent of Public Instruction be and the same are hereby granted.

3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially nondiscriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 91, Milton School District No. 8, Laurel Special School District, Seaford Special School District and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1957.

4. In accordance therewith defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts.

5. To further obtain and effectuate admittance, enrollment and education of said minor plaintiffs and all other children similarly situated to the public schools maintained in the respective above mentioned school districts, on a racially nondiscriminatory basis, defendant Members of the State Board of Education, having general control and supervision of the public schools of the State of Delaware and having the duty to maintain a uniform, equal and effective system of public schools throughout the State of Delaware, and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within 60 days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially non discriminatory basis, for the Fall Term of 1957, of pupils in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation approved by the State Board of Education.

6. 15 days prior to the submission of said plan to this Court, defendant Members of the State Board of Education, etc., shall send in writing by registered mail a copy of the plan of desegregation herein ordered to be submitted to this Court, together with a copy of this Order, to each member of the school board in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation.

---

6. The Delaware State Legislature has, by statute, provided the State Board of Education with broad powers of general control and supervision, including consultation with local Boards, Superintendents, and other officers, teachers and interested citizens, determination of educational policies, appointment of administrative assistants to administer its policies, requiring reports from Local Boards, the decision of all controversies involving administration of the school system, and the conducting of investigations relating to educational needs and conditions. 14 Del. Code § 121.

EDUCATION
Public Schools—Florida

Theodore GIBSON, as next friend for Theodore Gibson, Jr., et al. v. BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, Florida, et al.

United States Court of Appeals, Fifth Circuit, July 23, 1957, No. 16482.

SUMMARY: Negro school children in Dade County, Florida, filed a class action in federal district court against county school officials. They stated in their complaint that they had petitioned the school officials to abolish segregation in the public schools but that this had been refused. The district court dismissed the action on the grounds that none of the plaintiffs had sought or been denied admission to a particular school. 2 Race Rel. L. Rep. 9 (S.D. Fla. 1956). On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded. The court held that it was not necessary to show that admission to a particular school had been denied where it was shown that the officials had adopted an over-all policy of non-integration, because applications for admission would be futile. The court also stated that because of that policy, it was not necessary for the plaintiffs to exhaust their administrative remedies under the Florida Pupil Assignment Law (1 Race Rel. L. Rep. 924).

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge.

Negro children eligible to attend the public schools of Dade County, Florida, by their parents as next friends, filed a class action alleging irreparable injury and deprivation of their constitutional rights by the Board of Public Instruction and the Superintendent of Public Schools of that County. The complaint averred that each of the children seeks admission to the public schools of the County without racial segregation; that the defendants maintain and supervise such schools "under a system which provides certain schools for the education of white children only and others for the education of colored children only"; that the plaintiffs have petitioned the Board of Public Instruction to abolish racial segregation in the public schools of the County as soon as is practicable in conformity with the decision of the Supreme Court of the United States in Brown v. Board of Education, 349 U.S. 294 (1955), but that the Board has refused, and, instead, adheres to a statement of policy in part as follows:

> "It is deemed by the Board that the best interest of the pupils and the orderly and efficient administration of the school system can best be preserved if the registration and attendance of pupils entering school commencing the current school term remains unchanged. Therefore, the Superintendent, principals and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and conducted on a nonintegrated basis."

The complaint prayed for declaratory and injunctive relief.

Upon motion of the defendants, the district court dismissed the complaint holding that it did not set forth a justiciable case or controversy, and did not allege that the plaintiffs had sought admission to any particular school or had been denied the right to attend any school because of their race.[1]

The issue of justiciable controversy under such a complaint has been settled in Bush v. Orleans Parish School Board, 138 F.Supp. 337, 340 (E.D. La. 1956),[2] affirmed by this Court in 242 F.2d.

---

1. The opinion of the district court is reported in 2 Race Relations Law Reporter at p. 9.
2. The district court said:
"Defendants also move to dismiss on the ground that no justiciable controversy is presented by the pleadings. This motion is without merit. The complaint plainly states that plaintiffs are being deprived of their constitutional rights by being required by the defendants to attend segregated schools, and that they have petitioned the defendant Board in vain to comply with the ruling of the Supreme Court in Brown v. Board of Education of Topeka, supra. The defendants admit that they are maintaining segregation in the public schools under their supervision pursuant to the state statutes and the article of the Constitution of Louisiana in suit. If this issue does not present a justiciable controversy, it is difficult to conceive of one." 138 F.Supp. at p. 340.

156 (5th Cir. 1957).[3]

Under the circumstances alleged, it was not necessary for the plaintiffs to make application for admission to a particular school. As said by Chief Judge Parker of the Fourth Circuit in School Board of City of Charlottesville, Va. v. Allen, 240 F.2d, 59, 63, 64 (4th Cir. 1956):

> "Defendants argue, in this connection, that plaintiffs have not shown themselves entitled to injunctive relief because they have not individually applied for admission to any paticular school and been denied admission. The answer is that in view of the announced policy of the respective school boards any such application to a school other than a segregated school maintained for Colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief." 240 F.2d. at pp. 63, 64.

The appellees urge also that the judgment should be affirmed because the plaintiffs have not exhausted their administrative remedies under the Florida Pupil Assignment Law of 1956, Chapter 31380, Laws of Florida, Second Extraordinary Session, 1956. Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools.

The district court erred in dismissing the complaint. Its judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

3. This Court said:
"Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students. As patrons of the Orleans Parish school system they are undoubtedly entitled to have the district court pass on their right to seek relief." 242 F.2d. at p. 162.

EDUCATION
Public Schools—Florida

William M. HOLLAND, Jr., an infant, by William M. Holland, Sr., his father and next friend v. The BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, Florida, et al.

United States District Court, Southern District, Florida, July 5, 1957, No. 7161-M-Civ.

SUMMARY: A Negro child in Palm Beach County, Florida, applied to the county School Board under the state "Pupil Assignment Law" (1 Race Rel. L. Rep. 924) for transfer to a different school. The school to which transfer was requested was stated to have physical facilities superior to the school which was then attended, although it was a greater distance from the home of the child. The request for transfer was denied. The child then brought an action in federal district court to require his admission to the school, contending that the denial of his application had been made on the basis of his race. The court found that the denial of transfer had been made as an administrative decision based on crowded school conditions and that there was no indication of discrimination on the basis of race. The case was dismissed.

CHOATE, District Judge.

This cause having come on for trial on the 8th day of May, 1957, at West Palm Beach, Florida, before the Court sitting without a jury, and the Court having considered the evidence admitted therein, together with the arguments of counsel and other matters of record herein, does find and hold as follows:

STATEMENT OF THE CASE

The Negro plaintiff-child contends herein that he is entitled by law to attend a school outside of the school district in which his residence is situated. He maintains that the nearest school to his home, which is located in his school district and to which he was assigned, is not as modern nor as well equipped as the more distant school

which he wishes to attend. He also asserts that there are attending the preferred school one or more white children whose residences are further removed from that school than is his home, and therefore, he reasons that he is being discriminated against because of his color.

FINDINGS OF FACT

1. The plaintiff lives one-half mile from the "Pleasant City" School which he attends. That school is old, lacks adequate playgrounds and needs modernization. It is not equal in its physical plant facilities to many other schools in Palm Beach County, however, it is a fully accredited school academically and its instruction compares favorably with all other grade schools. The desired school, "Northboro" School, is one and one-half miles from plaintiff's home. It also is fully accredited, and has generally better playground and physical facilities. Both schools are quite overcrowded and have been for some time.

[*Schools Overcrowded*]

2. Palm Beach County is in the throes of unprecedented growth and has fairly well outgrown its school facilities. It needs a lot of new schools and many of its old schools like "Pleasant City" need to be either expanded and renovated in the immediate future or else abandoned and a new and larger school built. Several schools, including those attended primarily, if not exclusively, by white pupils are not even accredited. Much money has been raised and much building has been accomplished. The School Board has currently under consideration the improvement or abandonment of the "Pleasant City" School. School improvement monies have been expended upon added facilities in both colored and white neighborhoods without any show of discrimination. The white school population at present rate of growth is doubling every eight years and the colored about every twelve years. The problem of raising money is a vexing and pressing one, and bond sales have not been easy, and there is some doubt if bonds can be voted and sold fast enough in the future to enable the Board to provide all of the needed facilities promptly, and in fact it appears that it will only be after a slowdown in growth, that the needed facilities can catch up with the demand.

[*Districting System*]

3. Both "Pleasant City" and "Northboro" Schools as well as all the older schools in Palm Beach County, were built under the School District System. For years the counties in Florida were divided into School Districts. The Districts were organized by the residents of the several localities within the counties for the purpose of providing by self taxation (and some State help) school buildings and other means of education within the district. In counties like Palm Beach the colored voters organized their own districts within their own residential areas (which were apart from the white areas), and the white residents organized their districts in the areas where the white residents lived. When the School Board took over school operations upon a county wide basis, the attendance situation remained the same and the Board continued to recognize the districts as they existed. The adoption of the Florida School District Assignment Law did not alter the situation. That is, the old districts remained intact and those pupils who resided therein were assigned to attend the schools in their own (long existing) districts. There were, however, some exceptions or changes where new schools were built but none in or near the "Pleasant City" or "Northboro" districts. Because of the location of schools generally the assignment districts were such that the pupils actually were directed to attend the nearest school, and such was the case with the plaintiff.

[*Plaintiff's Petition*]

4. At the beginning of the school year, the plaintiff and a number of other pupils (mostly white) petitioned the School Board for permission to attend schools other than the one which was within the district wherein they severally resided. All applications were denied. There was no evidence that the plaintiff's application was denied because of his color, but to the contrary, the evidence indicated the denial (as was the cases of the others) was because he resided much closer to the other school and because he resided in another school (assignment) district.

5. The evidence showed that all the Palm Beach Schools were overcrowded including both the schools in question. The overcrowding in "Northboro" was perhaps the greater. The evidence was convincing that because of the school population increase that it was necessary to deny individual applicants leave to abandon their district school to attend a more distant school (already overcrowded) because of some personal

reason or because the more distant school was newer or otherwise deemed more desirable. All the testimony showed that it was presently necessary to hold the line as near as possible to prevent further overcrowding of the newest and best equipped schools.

6. It appears that the School Board of Palm Beach County is doing its best to solve the intricate problems that confront them, and that they have expended and plan to expend the remaining sums (6½ million) of the last bond issue where it will do the most good (to improve and expand existing facilities and build new ones), to relieve overcrowding and provide for expansion. They are contemplating ways and means to get the additional millions which will be required to catch up and keep up. The evidence shows that they have what appears to be a complete survey of all schools and that they are allocating their monies fairly, but manifestly their present money resources will not be adequate to do the job to provide for the expanding demand. The evidence shows that "Pleasant City" School is not sub-standard since it is fully accredited, and provides surroundings sufficient to insure good instruction. Its deficiency is its lack of necessary space both in rooms and playgrounds. What is true of the "Pleasant City" School is true to a greater or lesser extent of many of the older Palm Beach County Schools. The cure manifestly lies in securing more money, but except in some (two or three) schools not involved here, education is being successfully given in these older schools despite the handicaps.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The Court is of the opinion and so concludes that plaintiff's constitutional rights have not been infringed and that plaintiff has not been denied admittance to the "Northboro" School by reason of his color.

3. The plaintiff has been assigned to attend the nearest accredited grade school and that school is not sub-standard from an educational standpoint, and its deficiencies are physical, and generally those deficiencies are common to many of the older schools. The assignment of the plaintiff does not deny him any constitutional right, nor was he discriminated against by reason of that assignment, or the School Board's refusal to permit him to transfer to another more distant school.

4. The Court finds, for the above reasons, for the defendants and against the plaintiff. A final decree dismissing this suit will be entered by the Court.

5. The Court has considered retaining jurisdiction of this suit for the purpose of preventing future discrimination, but in view of the evidence which shows no attempt to discriminate but actual attempt to improve the very situation concerning which the plaintiff complains, the Court does not deem that retention of jurisdiction is necessary.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of July, 1957.

EDUCATION
Public Schools—Maryland

Stephen MOORE, Jr., a minor by Stephen Moore, Sr., his father and next friend, et al. v. BOARD OF EDUCATION OF HARFORD COUNTY et al.

United States District Court, District of Maryland, June 20, 1957, Civil No. 9105.

SUMMARY: In June, 1955, the Board of Education of Harford County, Maryland, took action to begin a study, through a Citizens Committee, to consider problems involved in initiating a policy of admission of children to county schools without regard to race. In November, 1955, a suit was filed in the federal district court of Maryland on behalf of twenty-one Negro school children to require the immediate desegregation of the schools. In February, 1956, the Citizens Committee made its report (1 Race Rel. L. Rep. 604) recommending the admission of children to county schools regardless of race (upon application to the Board if a transfer

was involved) beginning in September, 1956. The Board adopted this recommendation. Thereafter the original desegregation suit was dismissed by consent on stipulation of the parties. Four of the plaintiffs involved in the original suit later applied for transfers to previously "white" schools and the applications were denied by the Board. Without pursuing other administrative remedies, the four applicants filed an action in federal district court seeking their immediate admission to the schools. Referring to the rule adopted previously in *Robinson v. Board of Education of St. Mary's County*, 143 F. Supp. 481, 1 Race Rel. L. Rep. 862 (D. C. Md. 1956), the court declined to consider the case on its merits until the plaintiffs had exhausted the administrative remedies available to them under Maryland statutes. 146 F.Supp. 91, 2 Race Rel. L. Rep. 11 (1956). The plaintiffs, together with eight other persons who had intervened in the case, then appealed to the Maryland State Board of Education from the refusal of Harford County officials to grant their applications for transfer to "white" schools. While that appeal was pending the Harford County Board of Education issued an amendment to its desegregation plan which provided for applications for transfer to specified grade school classes which were found to be not overcrowded and for the gradual admission to schools on a non-racial basis so as to complete integration by 1963. The State Board dismissed the appeals. The plaintiffs then moved the court to order their immediate admission to the schools to which they had applied. The court reviewed the plan as modified by the county board and found that, although in certain respects the plan was not the best which might be adopted, it was a good faith attempt to desegregate the schools while reconciling problems of school administration and "the best interests of all the people in the county." The court approved the plan but ordered immediate action on the requests of two of the plaintiffs for transfer.

THOMSEN, Chief Judge.

This action was brought by four Negro children, on their own behalf and on behalf of those similarly situated, seeking admission to certain public schools in Harford County, Maryland. The background and first stages of the case are detailed in an opinion filed herein on November 23, 1956, 146 F. Supp. 91.

Following that opinion, the four plaintiffs and eight other children, who have asked and been granted leave to intervene in this case, filed appeals with the State Board of Education from the refusal of the Superintendent of Schools of Harford County to grant their applications for transfer from consolidated schools for colored children to various white schools which were not desegregated in September, 1956.

[*Plan Modified*]

While those appeals were pending before the State Board, on February 6, 1957, the Harford County Board adopted the following "Extension of the Desegregation Policy for 1957-1958":

> "Applications for transfers will be accepted from pupils who wish to attend elementary schools in the areas where they live, if space is available in such schools. Space will be considered available in schools that were not more than 10% overcrowded as of February 1, 1957. All capacities are based on the state and national standard of thirty pupils per classroom.
>
> "Under the above provision, applications will be accepted for transfer to all elementary schools except Old Post Road, Forest Hill, Bel Air, Highland, Jarrettsville, the sixth grade at the Edgewood High School, and Dublin. Such applications must be made during the month of May on a regular application form furnished by the Board of Education, and must be approved by both the child's classroom teacher and the principal of the school the child is now attending.
>
> "All applications will be reviewed at the regular June meeting of the Board of Education and pupils and their parents will be informed of the action taken on their applications prior to the close of school in June, 1957."

After a hearing, the State Board dismissed the appeals, finding that "the Harford County Board acted within the policy established by the State Board," that "the County Superintendent acted in good faith within the authority set forth in the August 1, 1956, Desegregation Policy adopted

by the County Board,"[1] that "the Desegregation Policy was adopted in a bona fide effort to make a reasonable start toward actual desegregation of the Harford County public schools," and that "this initial effort [the desegregation of three grades in two elementary schools] has been carried out without any untoward incidents." The State Board also took "cognizance of the resolution of the County Board of February 6, 1957," set out above herein, "as well as the testimony to the effect that the proposed Harford County Junior College, which is to be established in Bel Air in the fall of 1957, will open on a desegregated basis, and also the testimony to the effect that the present program of new buildings and additions will make further desegregation possible."

[*Further Court Hearings*]

After the decision of the State Board, plaintiffs set this case for further hearing, as provided in the earlier decree, 146 F. Supp. at 98. That hearing was held on April 18, 1957. Charles W. Willis, the Harford County Superintendent, explained and amplified the February 6, 1957 resolution of the County Board. The President of the Board and its counsel accepted that interpretation. So explained and amplified, the plan was substantially the same as the plan which was later adopted by the County Board on May 1, 1957, as follows:

> "The Board reviewed its desegregation policy of February 6, 1957. In accordance with this plan, the following elementary schools will be open in all six grades to Negro pupils at the beginning of the 1957-1958 school year:
>
> Emmorton Elementary School
> Edgewood Elementary School
> Aberdeen Elementary School
> Halls Cross Roads Elementary School
> Perryman Elementary School
> Churchville Elementary School
> Youth's Benefit Elementary School
> Slate Ridge Elementary School
> Darlington Elementary School
> Havre de Grace Elementary School
> 6th Grade at Aberdeen High School
>
> "Schools now under construction or contemplated for construction in 1958, if no unforeseen delays occur, will automatically open all elementary schools to Negro pupils by September, 1959. As a result of new construction, the elementary schools at Old Post Road, Bel Air, and Highland will accept applications for transfer of Negro pupils for the school year beginning in September, 1958. Forest Hill, Jarrettsville, Dublin and the sixth grade at the Edgewood High School would receive applications for the school year beginning in September, 1959.
>
> "As a normal result of this plan, sixth grade graduates will be admitted to junior high schools for the first time in September, 1958 and will proceed through high schools in the next higher grade each year. This will completely desegregate all schools of Harford County by September, 1963.
>
> "The Board will continue to review this situation monthly and may consider earlier admittance of Negro pupils to the white high schools if such seems feasible. The Board reaffirmed its support of this plan as approved by the State Board of Education."

At the April, 1957 hearing, I ruled tentatively that the plan was generally satisfactory for the elementary grades, but not for the high school grades, and suggested that the parties attempt to agree on a modified plan. Conferences between counsel were held, but no agreement was reached. The County Board, however, on June 5, 1957, modified the plan as follows:

> "The Board reaffirmed its basic plan for the desegregation of Harford County Schools, but agreed to the following modification for consideration of transfers to the high schools during the interim period while the plan is becoming fully effective.
>
> "Beginning in September, 1957, transfers will be considered for admission to the high schools of Harford County. Any student wishing to transfer to a school nearer his home must make application to the Board of Education between July 1 and July 15. Such application will be evaluated by a committee consisting of the high school principals of the two schools concerned, the Director of Instruction, and the county supervisors working in these schools.
>
> "These applications will be approved or disapproved on the basis of the probability of success and adjustment of each individual pupil, and the committee will utilize

1. See 146 F. Supp. at 95.

the best professional measures of both achievement and adjustment that can be obtained in each individual situation. This will include, but not be limited to, the results of both standardized intelligence and achievement tests, with due consideration being given to grade level achievements, both with respect to ability and with respect to the grade into which transfer is being requested.

"The Board of Education and its professional staff will keep this problem under constant and continuous observation and study."

The modified plan was presented to the court at a hearing on June 11, 1957. It was made clear that when an elementary school has been desegregated, all Negro children living in the area served by that school will have the same right to attend the school that a white child living in the same place would have, and the same option to attend that school or the appropriate consolidated school that a white child will have. The same rule will apply to the high schools, all of which operate at both junior high and senior high levels, as they become desegregated, grade by grade. Of course, the County Board will have the right to make reasonable regulations for the administration of its schools, so long as the regulations do not discriminate against anyone because of his race; the special provisions of the June 5, 1957 resolution will apply only during the transition period.

[*Bases of Assignments*]

Willis also testified that the applications which will be made pursuant to the June 5, 1957 modification will be approved or disapproved on the basis of educational factors, for the best interests of the student, and not for other reasons. I have confidence in the integrity, ability and fairness of Superintendent Willis and of the principals, supervisors and others who will make the decisions under his direction. In the light of that confidence, I must decide whether the modified plan meets the tests laid down in the opinions of the Supreme Court and of the Fourth Circuit,[2] with such guidance as may be derived from other decisions.[3] The burden of proof is on defendants to show that a delay during a transition period is necessary, that the reasons for the delay are reasons which the court can accept under the constitutional rule laid down by the Supreme Court, and that the proposed plan is equitable under all the circumstances. In considering whether defendants have met that burden, the court must recognize that each county has a different combination of administrative problems, traditions and character. Many counties are predominantly rural, others suburban; some have large industrial areas or military reservations. See 146 F. Supp. at 92.

[*Chronology of Integration*]

Eleven out of the eighteen elementary schools in Harford County will be completely desegregated in September, 1957, three months from now. Three more will be completely desegregated in 1958, and the remaining four in 1959. The reason for the delay in desegregating the seven schools is that the county board and superintendent believe that the problems which accompany desegregation can best be solved in schools which are not overcrowded and where the teachers are not handicapped by having too many children in one class. That factor would not justify unreasonable delay; but in the circumstances of this case it justifies the one or two years delay in desegregating the seven schools.

[*High Schools*]

With respect to the high schools, other factors are involved. Superintendent Willis testified that when a child transfers to a high school from another high school he faces certain problems which do not arise when he enters the seventh grade, which is the lowest grade in the Harford County high schools. After a year or so in the high schools social groups, athletic groups and subject-interest groups have begun to crystallize, friendships and attachments have been made, cliques have begun to develop. A child transferring to the school from another high school does not have the support of a group with whom he has passed through elementary school. A Negro child transferring to an upper grade at

2. Brown v. Board of Education, 349 U.S. 294; Brown v. Board of Education, 347 U.S. 483; Carson v. Warlick, (4 Cir.) 238 F.2d 724; Carson v. Board of Education of McDowell County, (4 Cir.) 227 F.2d 789.

3. Aaron v. Cooper, (E.D. Ark.) 143 F. Supp. 855; Kelley v. Board of Education of the City of Nashville, (M.D. Tenn.) 2 Race Rel. L. Rep. 21 (1957). Cf. Mitchell v. Pollock, (W.D.Ky.) 2 Race Rel. L. Rep. 305, (1957).

this time would not have the benefits of older brothers, sisters or cousins already in the school, or parents, relatives or friends who have been active in the P.T.A. High school teachers generally, with notable exceptions, are less "pupil conscious" and more "subject conscious" than teachers trained for elementary grades, and because each teacher has the class for only one or two subjects, are less likely to help in the readjustment. The Harford County Board had sound reasons for making the transition on a year to year basis, so that most Negro children will have a normal high school experience, entering in the seventh grade and continuing through the same school. But I was unwilling in April to approve a plan which would prevent all Negro children now in the sixth grade or above from ever attending a desegregated high school.

[*Transfers Available*]

However, the modified plan adopted on June 5, 1957, permits any Negro child to apply next month for transfer to a presently white high school, and if his application is granted, to be admitted in September, 1957, three months hence. This plan is different from any to which my attention has been called or about which I have read. It is an equitable way of handling the transition period. My only doubt is whether it is necessary to postpone until September, 1958, the complete desegregation of the seventh grade. But I am not charged with the responsibility of administering the Harford County public school system. Although I think the reasons given for the delay of one year are less satisfactory than the reasons given for the rest of the plan, a federal court should be slow to say that the line must be drawn here and cannot reasonably be drawn there, where the difference in time is short and individual rights are reasonably protected, during the transition period, as they are by the June 5, 1957 modification.

[*Plan Approved*]

Plaintiffs are obviously worried whether the June 5 plan will be carried out in good faith, or whether it will be used as a means of postponing the admission of Negro children into the high schools without proper justification. Although, as I have said, I have confidence in Superintendent Willis and his staff, plaintiffs' doubts are not unreasonable in view of the past history of this litigation. I will, therefore, enter a decree which will spell out the rights of individual children under the plan, and will retain jurisdiction of the case, so that if any child or his parents feel that his application has been rejected for a reason not authorized by the modified plan, a prompt hearing may be granted.

[*Estoppel Against School Officials*]

There remains the question of estoppel, based upon the resolution adopted by the County Board on March 7, 1956, and the interpretation of that resolution by its counsel in open court in the earlier Harford County case, as a result of which the plaintiffs therein dismissed their action. The facts on this point are set out fully in 146 F. Supp. 93 et seq.

The March 7, 1956 resolution was somewhat ambiguous, but, as it was interpreted by defendants' counsel in open court, plaintiffs were justified in believing, as I did, that applications for transfer would be considered without regard to the race of the applicant. The County Board interpreted it differently in the statement entitled "Desegregation Policy" adopted on August 1, 1956; see 146 F. Supp. at 95. I cannot accept the interpretation adopted by the County Board, but I find that it was adopted as a result of a mistake and not as the result of any bad faith on the part of the Board, the Superintendent, or their counsel. The Board adopted the Desegregation Policy of August, 1956, in the honest belief that it was to the best interests of all of the children in the County. Pursuant to that policy the Superintendent admitted fifteen Negro children to two previously white schools, but denied admission to forty-five others, including the infant plaintiffs herein.

There is grave doubt whether a governmental agency such as a county school board can be estopped from adopting a policy, otherwise legal, which it believes to be in the best interests of all the people in the County. In the instant case it would be inequitable and improper, on the ground of estoppel, to require the County Board to open all schools to Negroes immediately, as requested in the complaint. The County Board should not be foreclosed by the facts which I have found from taking such actions, and adopting and modifying such policies, as it believes to be in the best interest of the people in the County, so long as those actions and those policies are constitutional.

[*Individual Plaintiff's Rights*]

The individual plaintiffs in the earlier case, however, were prevented from pressing their individual rights in this court and on appeal by the adoption of the March 7, 1956 resolution and by what took place in this court in that case. See 146 F. Supp. 93 et seq. Two of those infant plaintiffs are before the court in this case, and their counsel urge that their individual rights, as well as any class rights, be enforced. The reasons which prevent an estoppel against the County Board so far as its general policies are concerned, do not apply with equal force to the individual claims of those two children. It would not be equitable to delay any further the enforcement of their individual rights.

I will, therefore, include in the decree a provision enjoining the County Board from refusing to admit Stephen Moore and Dennis Spriggs to whatever school would be appropriate for them if they were white.

EDUCATION
Public Schools—Tennessee

John KASPER v. D. J. BRITTAIN, Jr., et al.

United States Court of Appeals, Sixth Circuit, June 1, 1957, No. 13046.

SUMMARY: In a class action filed by Negroes in Anderson County, Tennessee, prior to the decision of the United States Supreme Court in the *School Segregation Cases*, a federal district court, on remand from the Court of Appeals for the Sixth Circuit, had directed the defendants in that action, county school officials, to admit pupils to the county high school on a racially non-discriminatory basis beginning with the fall, 1956, school term. *McSwain v. Board of Education of Anderson County*, 1 Race Rel. L. Rep. 317 (E.D. Tenn. 1956). At the opening of the school term the school officials petitioned the court for a restraining order, alleging that John Kasper, the appellant in the present case, and certain other persons were interfering with their compliance with the court's order. On August 29, 1956, the court issued a temporary restraining order against several named and unnamed persons. The following day a petition for contempt citation was filed by the school officials against John Kasper, named in the restraining order, for having violated the order. The court convicted him of contempt for the violation and sentenced him to imprisonment for one year. *Sub nom., McSwain v. Board of Education of Anderson County*, 1 Race Rel. L. Rep. 872, 1045 (E.D. Tenn. 1956). Kasper appealed this conviction on the ground, among others, that the restraining order restricted his constitutional right of freedom of speech. The Court of Appeals, Sixth Circuit, affirmed, holding that freedom of speech does not extend to an incitement of illegal action and that the restraining order was a valid exercise of the court's enforcement powers as to its decrees. [See also 2 Race Rel. L. Rep. 26, 317, and 795 for another contempt action against Kasper and other persons arising out of this case.]

Before SIMONS, Chief Judge, and McALLISTER and MILLER, Circuit Judges.

SIMONS, Chief Judge.

The appellant was found guilty of a criminal contempt by the district judge in wilfully disregarding and violating the court's order of August 29, 1956, in a school segregation case. He was sentenced to be confined in some institution to be designated by the Attorney General of the United States for a period of one year, and was admitted to bail pending appeal. He challenges the order on constitutional, jurisdictional and procedural grounds.

The background of the contempt proceeding is important. On April 26, 1952, the district judge dismissed a proceeding against the County Board of Education of Anderson County, Tennessee, for a declaratory judgment and injunction, restraining it from continuing a custom denying colored children rights guaranteed them by the

Fourteenth Amendment to the Constitution of the United States. No State statute was involved. McSwain, et al., v. County Board of Education, 104 Fed. Supp. 861. On appeal to this court, judgment was reversed and the case remanded to the district court for further proceedings, in conformity with the decision of the Supreme Court in Brown, et al. v. Board of Education, 347 U. S. 483. In compliance, the district court issued an injunctional order, requiring the appellees to desegregate the High Schools of Anderson County by the fall term of 1956. The appellees accepted the order, as required by the law of the land, and proceeded to comply with it. Twelve Negroes were enrolled in the Clinton, Tennessee, High School at the beginning of the fall term, without disrupting ordinary school routine and without picketing or violence of any kind.

[*Appellant's Arrival*]

This was the situation in Clinton when on Saturday, August 25, 1956, the appellant arrived from somewhere in the East. His declared purpose, established cumulatively by many witnesses, was to run the Negroes out of the school or to cause Brittain, its principal, to resign his job, and so to violate the court's segregation order. To achieve that purpose, he organized a movement designed to implement it. On Monday, August 27th, mass picketing began in front of the school and by Wednesday, August 29th, the crowd had grown and become menacing, so that both students and faculty were terrorized, and one Negro pupil had been attacked. When urged to desist, appellant replied that the court order need not be obeyed and stated to Brittain "If you keep this up, there is going to be bloodshed."

On August 29th, the appellees petitioned the court for injunctive relief, alleging that the appellant, in concert with others, had begun the organization of a movement to prevent the petitioners from obeying the desegregation order, of which he had full knowledge, and urging his following to ignore it and to do all they could to impede, obstruct and intimidate the appellees from carrying it out. The court issued an ex parte temporary restraining order, prohibiting the appellant and others from further hindering, obstructing, or in any way interfering with the carrying out of the court's order and from picketing Clinton High School, either by words, acts, or otherwise, and directing the appellant to appear on the following day in the court at Knoxville to show cause why a preliminary injunction should not issue.

[*Violation of Order*]

On the same day the restraining order was served upon the appellant and immediately after such service, the appellant made a speech to a crowd of 1,000 to 1,500 people to the effect that although he had been served with the restraining order, it did not mean anything and that the Supreme Court's ruling in the segregation cases was not the law of the land. Thereafter, an order of attachment was issued by the court, charging that appellant's speech was a wilfull violation of the restraining order and constituted criminal contempt. The order of attachment was served and the appellant appeared with counsel before the court, on August 30, 1956. The court explained to him and his attorney that he would hold an immediate hearing on the issue of the preliminary injunction sought by the appellees but that there could be a continuance on the criminal contempt charge, if they desired it. Appellant's counsel, at first, requested time to prepare his defense on the contempt charge but during the hearing on the preliminary injunction changed his mind and, at his express request, the hearing proceeded on both the preliminary injunction and the contempt proceeding. The United States Attorney participated in it, at the request of the court and without objection interrogated witnesses. The court held the restraining order to have been properly issued and that the evidence justified its continuance as a preliminary injunction. The court also held that the appellant had wilfully violated the temporary restraining order; that his conduct was not protected by the First Amendment; and that he was guilty of a criminal contempt. The sentence here challenged was then imposed. On Friday August 30, Saturday August 31st, and Sunday September 1st, violence became rampant in Clinton. A mob formed, estimated at 3,000 people, with which the local police officials and others deputized to meet the emergency clashed, and, though tear gas was used, the mob could not be controlled. The State Patrol and National Guard were called and, at one point, the Guard was obliged to use fixed bayonets. Finally, the Guard Commander at head of 667 men was able to restore order.

[*Grounds of Appeal*]

Appellant's challenge to the validity of the sentence is on the ground that the statements made by him, as set forth in the citation and attachment, are protected by the First Amendment of the United States Constitution, guaranteeing freedom of speech; that the procedure followed by the trial court constituted a denial of procedural due process of law under the Fifth Amendment, because the temporary restraining order was not served upon him, so he could not be guilty of violating it; that the contempt citation can not stand, because it was not brought in the name of the United States which is the real party in interest and so the conviction is null and void; that the original defendants having complied with the court's order, the case was thereby closed and appellant could not be guilty of criminal contempt for speaking against it; that the service of the contempt citation was void, because it was served upon the appellant in the courthouse where he appeared in answer to the show cause order; that the procedure constituted an improper use of the Federal police power, since the State police power had not been exhausted; and that the sentence was grossly excessive. Appellant makes no claim that he was illegally denied a trial by jury. No request for a jury trial was made by him, and his counsel conceded in oral argument that appellant was not entitled to one.

[*Powers of Court*]

The question whether the district court had jurisdiction of the controversy and the power to enforce its order by the injunctive process need give us little trouble. In Brown v. The Board of Education, 347 U. S. 483, the Supreme Court concluded that in the field of public education segregation is a denial of equal protection of the laws. The constitutional principle there decided was implemented by the mandate for decree in Brown v. Board of Education, 349 U. S. 294, wherein the cases there considered were remanded to the district courts to take such proceedings and enter such orders and decrees consistent with the opinion, as are necessary and proper to admit the parties to the cases to the public schools on a racially nondiscriminatory basis, with all deliberate speed. By the holdings there announced, we were bound in reversing the McSwain case and the district court was, likewise, bound to issue its injunctional order, requiring the School Board to desegregate the High Schools of Anderson County. Moreover, in directing this to be done, the district judge acted with all deliberate speed, in conformity with our decision and the decision of the Supreme Court, when he commanded the School Board to desegregate by the fall term of 1956. It would seem that the Brown case, its associated cases, and our own judgment in McSwain would be a conclusive response to the appellant's arguments, without further rationalization. There is also available to us, however, the exhaustive and scholarly opinion of Circuit Judge Woodrough, speaking for the Court of Appeals of the Eighth Circuit, in Brewer v. Hoxie School District No. 46, 238 F. (2d) 91, 98, wherein it was held that the jurisdiction of the Federal Courts and the application of its remedies to protect rights safeguards by the Constitution is now so well established that no one may question it. The Brewer case is completely documented and we have benefitted much from the thoroughness of the research there disclosed.

[*Limitations on Free Speech*]

The right to speak is not absolute and may be regulated to accomplish other legitimate objectives of government. The First Amendment does not confer the right to persuade others to violate the law. Giboney v. Empire Storage Company, 336 U. S. 490, 502. The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment, Dennis v. United States, 341 U. S. 494; Feiner v. New York, 340 U. S. 315; Beauharnais v. Illinois, 343 U. S. 250; Chaplinsky v. New Hampshire, 315 U. S. 568.

Appellant had urged the crowd to disregard the orders of the court and to continue pressure upon the school officials until Negroes were eliminated from the Clinton High School. This, clearly, was not a mere exposition of ideas. It was advocacy of immediate action to accomplish an illegal result, sought to be avoided by the restraining order. The clear and present danger test, as applied by Judge Learned Hand, and adopted by the Supreme Court in the Dennis case, is here met by the mob violence that followed the urgings of the appellant. Danger that calls for the presence of the State Patrol and the National Guard, with the use of bayonets and tear gas, is, we think, within the

narrowest limits of the concept and cries aloud for such court action as was here taken.

[*Serving of Order*]

The contention that the procedure followed by the trial court constituted a denial of procedural due process because the temporary restraining order was not served upon the appellant, wherefore, he could not be guilty of violating it, is simply not applicable to the facts of record. The restraining order was served upon the appellant by the Marshal, who, with his deputy, gave clear and persuasive evidence of its service upon the appellant, the reading to him of the injunctional order, and the delivery to him of the citation, after which the appellant held up the paper and said to the crowd: "The Marshal served a temporary injunction on me and I have to appear over at Knoxville at the Federal Court Building tomorrow at 1 o'clock for a hearing . . . . You are all cordially invited to come over and we will demonstrate. . . . I will be with you folks until every Nigger is run out of the Clinton School." The Marshal's evidence was corroborated by his deputies and other witnesses. The suggestion of the appellant that the court's observation that it was of the *opinion* that the appellant knew about the restraining order is not a finding of fact, is but a captious play upon words.

The insistence of the appellant that the case was closed when the original defendants had complied with the court's order, so that he could not be guilty of criminal contempt for speaking against it must be rejected as clearly without merit. The Federal Court is always empowered to enforce its decrees by orderly process. The further contention that because the order was served upon the appellant in the courthouse, while he was responding to the order to show cause, requires no citation of authority to vindicate the court's action. The appellant was within the jurisdiction of the court at Knoxville as he was at Clinton and was not brought into it by the attachment. So, with the contention that the procedure followed constituted an improper use of Federal Police power, since the State Police power had not been exhausted, is equally untenable. The Federal Courts are empowered to protect Constitutional federal rights even though State power may equally be so exercised.

[*Sentence Not Excessive*]

The contention that the sentence imposed upon the appellant was excessive is, likewise, rejected. Punishment is not "cruel and unusual," unless it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. United States v. Weems, 217 U. S. 349; United States v. Rosenberg, 195 F. (2d) 583 (C. A. 2), certiorari denied, 344 U. S. 838. That is not the case here.

Finally, an injunctional order issued by a court must be obeyed, however, it may seemingly be challenged as invalid. This principle has long been accepted and is crystallized in the classic comment of Mr. Chief Justice Taft in Howat v. Kansas, 258 U. S. 181, 189, wherein, speaking for a unanimous court, he said: "It is for the court of first instance to determine the question of the validity of the law and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders, based on its decision, are to be respected." United States v. United Mine Workers of America, 330 U. S. 258, 293; Amalgamated Clothing Workers v. Richman Brothers Co., 211 F. (2d) 449, 452 (C. A. 6). So only, may the dignity of courts be maintained and Constitutional rights be ab initio preserved.

Judgment affirmed.

EDUCATION
Public Schools—Tennessee

UNITED STATES v. Frederick John KASPER et al.

United States District Court, Eastern District, Tennessee, July 23, 1957, Civ. No. 1555.

SUMMARY: In a class action filed prior to the decision of the United States Supreme Court in the *School Segregation Cases*, the United States District Court had directed, on January 4, 1956, that school officials of Anderson County, Tennessee, admit pupils to the Clinton high

school on a racially non-discriminatory basis beginning with the fall, 1956, school term. 1 Race Rel. L. Rep. 317. At the opening of the fall term, school officials petitioned the court for a restraining order, alleging that John Kasper and certain other persons were interfering with the school officials' compliance with the court's order. On August 29, 1956, the court issued a temporary restraining order against several named and unnamed persons. The following day a petition for a criminal contempt citation was filed by the school officials against one John Kasper for having violated the restraining order. The court issued an order of attachment and subsequently convicted him of contempt. 1 Race Rel. L. Rep. 872, 1045 (1956). The conviction was affirmed by the Court of Appeals for the Sixth Circuit. See p. 792. On December 5, 1956, the court issued an order of attachment against seventeen other persons for contempt of the court's order of January 4, 1956. 2 Race Rel. L. Rep. 26. On petition by the United States Attorney, the court issued an amended order of attachment on February 25, 1957, against all the defendants in the name of the United States. 2 Race Rel. L. Rep. 317. Trial of seventeen of the defendants (one having died) was begun in federal district court before a jury on July 8, 1957. During the trial there was a dismissal as to six of the defendants. The trial was concluded on July 23, 1957, with the conviction of seven of the defendants. Set out below is the judge's charge to the jury.

TAYLOR, District Judge.

COURT'S INSTRUCTIONS TO THE JURY

TWELFTH DAY OF TRIAL
Tuesday, July 23, 1957

(Whereupon, at 9:03 a.m. Court reconvened pursuant to adjournment when the following proceedings were had in the presence of the jury, to-wit:)

The Court: Ladies and gentlemen of the jury, this is a prosecution authorized by a statute of the United States relating to criminal contempt. The criminal contempt with which the defendants are charged is violation of an injunction issued by this Court and made permanent on September 6, 1956. At one time the proceeding was against eighteen defendants. That number has been reduced to eleven by the death of one of the defendants and by dismissal as to six of the others. The defendants have entered pleas of not guilty. There is, therefore, presented the issue of whether or not the defendants are guilty of criminal contempt by reason of their alleged violation of the aforesaid injunction.

Whether the injunction was properly issued is a question of law for the Court. With that question the jury is not concerned, but should proceed on the assumption that the injunction was properly issued and was and is a valid and lawful injunction.

Again, whether issuance of the injunction was an encroachment upon matters which should have been dealt with only by the State of Tennessee, is not a question with which the jury is concerned. The injunction was issued under the authority of federal law, and whether the law itself was a valid and proper exercise of federal powers is a judicial question.

[*Integration Not At Issue*]

Whether school integration is right or wrong is a question to be debated in the public forum of speech and press. The right or wrong of integration is not pertinent to the question before the jury, namely, whether the defendants violated the injunction aforesaid under such circumstances as to make them guilty of criminal contempt.

In this charge the Court will undertake to state the law and the rules which are deemed applicable to and controlling of the deliberations and verdict of the jury. Any suggestions made by counsel as to what the Court will charge place no obligation upon the Court to charge in the anticipated manner. When an attorney makes a predication along that line, he does so at his own risk. When a charge is given by the Court on a particular matter, there of course exists the possibility of error, but it is intended to be correct and it is the duty of the jury to proceed on the assumption that the law has been correctly charged.

It has been observed by the jury that the defendants did not take the stand in their own defense. That is a fact of passing interest only. Failure of a defendant to testify in his own behalf has not evidentiary significance, and no unfavorable inferences should be drawn from such failure. It is strictly a defendant's privi-

lege to testify or not to testify, as he likes. Each defendant entered the trial with a presumption of innocence in his favor, and it was not his obligation to sustain the presumption; it was the prosecution's duty to overthrow it in order to warrant a finding of guilt.

Following is the pattern required to be followed in overcoming the presumption of innocence:

1. It must appear that the defendants had actual knowledge that the injunction had been issued and had a reasonable understanding of what they were forbidden to do. Actual notice means that the issuance of the injunction was brought to their attention as a fact. A reasonable understanding of what they were forbidden to do means that they must have understood that it forbade them to enter into an agreement with defendant Kasper to violate the injunction; also that it forbade them to interfere with integration at Clinton High School.

2. The second requisite in the pattern of proof is, that the defendants did enter into an agreement with Kasper to interfere with integration. In the language of the injunction, defendants were forbidden to act "in concert" with Kasper. In the order of attachment against the defendants they were charged with having entered into an agreement with Kasper. Acting in concert, therefore, is there construed as acting pursuant to an agreement, which is another way of stating the charge as that of acting in conspiracy with Kasper. The proof required accordingly is proof of a conspiracy.

3. The third requisite is proof that a defendant, or defendants, who conspired with Kasper hindered, obstructed or interfered with integration in one or the other of the ways charged against them, and which will hereinafter be set out in full.

Those are the three parts of the pattern. All are indispensable. If one part is missing, the whole pattern falls apart.

And the burden is not on the defendants to knock out one of the parts. The burden is upon the government to put the parts in place and to make the pattern complete.

[*Presumption of Innocence*]

As heretofore stated, every defendant placed on trial on a criminal charge is presumed to be innocent of that charge; he starts into the trial with the presumption of innocence in his favor.

That presumption of innocence is to be borne in mind by the jury throughout their deliberations on the case. It protects the defendants from a verdict of guilty unless, after the jury has carefully weighed all the evidence in the case and considered it, that evidence satisfies the jury of the defendant's guilt, and satisfies you so clearly, as to the guilt of the defendant, as to leave in your mind no reasonable doubt of his guilt. If the evidence, after it has been weighed by the jury, satisfies you that the defendants are guilty as charged, satisfies so clearly as to leave no reasonable doubt, or as is ordinarily said, satisfies you beyond a reasonable doubt, then the presumption of innocence with which the defendants have been shielded up to that time, is overthrown. It ceases then to protect the defendants any longer, and it is the duty of the jury to bring in a verdict of guilty, the Government has then made out a case. The Government has established it sufficiently under the rules of law, when it has established it beyond a reasonable doubt.

On the other hand, if the evidence, after it is weighed by the jury, does not satisfy you as to the defendants' guilt, or if it is so weak and uncertain as to leave in the minds of the jury a reasonable doubt on the question of the guilt of the defendants, then the presumption of innocence is not overthrown; the defendants are still protected by that presumption, and it is the duty of the jury to bring in a verdict of not guilty.

The defendants, as the Court has charged you, are presumed to be innocent, and this presumption continues throughout the trial and during the deliberations of the jury; and is overcome when, and only when, their guilt is established beyond a reasonable doubt.

[*Reasonable Doubt*]

Now what is meant by being satisfied beyond a reasonable doubt? That does not mean that the Government has to make out the case to an absolute certainty. It is almost impossible to make out a case to an absolute certainty. There may be always, or almost always, some element of uncertainty in every criminal case. The Government does not make out a criminal case like a sum in mathematics, where you know that if you have certain elements as in adding two and two together the result is four. That is something

you absolutely know. The Government does not have to prove a criminal case to that absolute certainty. It has to prove it though, so as to leave no reasonable, substantial doubt in the minds of the jury. A doubt that prevents you from finding a man guilty—if the proof shows guilt—is not to be a whimsical or captious doubt, but a substantial doubt, and it must rest upon some element of weakness in the proof that gives you, as reasonable ladies and gentlemen, a reason for doubting guilt. If there should be any evidence in the case that has created a reasonable doubt in your minds of the guilt of the defendants, then the case is not made out beyond a reasonable doubt. But, if there is no reasonable ground of doubting guilt as reasonable men and women, then it is made out beyond a reasonable doubt.

Evidence is the material by means of which the mind reaches its decision. It is presented on the assumption that each juror's mind is open and receptive to truth. It is presented on the further assumption that juror minds are selective minds, that those minds will distinguish between what is true and what is false, and that only truth so far as ascertainable will affect the final decision.

[*Direct Evidence*]

Evidence is direct and indirect. Direct evidence is that which a witness has acquired through use of one or more of the physical means of discernment, such as sight, hearing and touch. A witness may testify that a certain act was committed and that he saw the actor commit it. He may testify that he recognized the person who committed the act, that he was well acquainted with that person, that he was near enough to see him plainly, that he did see him plainly and did recognize him. For purposes of identity, sight is the most commonly used medium. Respecting what is said, the most commonly used medium is the sense of hearing.

In like manner, other senses have their own particular functions, and evidence obtained through them and transmitted to the jury is classed as direct evidence.

Indirect evidence is otherwise called inference evidence, or circumstantial evidence. Where the direct evidence standing alone is sufficient to establish guilt or innocence, the occasion for using circumstantial evidence does not exist. It is where the direct evidence standing alone fails to establish guilt or innocence that the indirect or circumstantial evidence may be considered, that inferences may be drawn from proven facts. But where inferences are relied on, they are subject to their own rule. Where relied on in support of a verdict of guilty, the inferences drawn must be the only inferences that could reasonably be drawn and they must point to guilt to the exclusion of all other conclusions.

[*Application to Conspiracy*]

To illustrate, suppose you see A and B together in a place where it is known to you that no third party is present. While your eyes are momentarily closed you hear a shot. When you open your eyes you see B falling mortally wounded and A standing near him with a smoking gun in his hand. You did not actually see the killing, yet the only reasonable inference is that A did kill B by shooting him. But suppose A, B and C are present. When you open your eyes you see B falling, while A and C have smoking guns in their hands. In that situation you cannot conclude that A killed B. This is because you cannot by inference exclude the possible conclusion that C killed B.

These limitations upon circumstantial evidence are of peculiar importance where you are dealing with numerous defendants, all charged with having done certain things, all allegedly tied to certain other elements of incriminating character, and where you are called upon to conclude that guilt exists because the alleged ties existed.

By way of more specific comparison, you are called upon to find that defendant John Kasper was the hub of a conspiracy and that from him a spoke radiated out to each of the other defendants; that each defendant acted in response to impulses received from Kasper; that the hub and the spokes and the impulses and the responsive acts made of them conspirators and perpetrators of conspiratorial offenses. The mental diagram may seem simple enough, but there are complications yet to be considered.

[*Review of Case*]

A brief review of the record and of the charges as to circumstances out of which these proceedings grew should make a little clearer those

problems which are presented for jury consideration.

On December 5, 1950, a suit was filed in this court by Joheather McSwain and five other Negroes of high school grade against school officials of Anderson County, Tennessee, wherein a declaration of rights was sought and an injunction against exclusion of Negroes from Clinton High School. At that time Tennessee's constitutional and statutory prohibitions against integration of Negro and white races in public schools was not considered violative of rights guaranteed to citizens by the Constitution of the United States, provided separation of races did not result in inequality of opportunity. Trial of the McSwain case resulted in a finding by the court that inequality of opportunity did not exist. Accordingly, the suit by those complainants was decided adversely to them, and the same was ordered dismissed.

[*Reversal By Sixth Circuit*]

While that case was pending on appeal before the United States Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, the Supreme Court of the United States overturned existing pronouncements on the subject of segregation. That court, having examined the problem from the Negro viewpoint, declared that equality of opportunity was not enough, but that Negroes had a right to integrate themselves with white children in the public schools. Thereupon the United States Court of Appeals for the Sixth Circuit reversed the action of this court in dismissing the McSwain case and ordered this court to proceed in accordance with the decision of the Supreme Court of the United States. That mandate from the Sixth Circuit was received June 30, 1954. One year and six months later, namely, on January 4, 1956, this court fixed the limits beyond which admission of Negroes to Clinton High School should not be postponed, this being the language used in the court's memorandum:

> "It is the opinion of this Court that desegregation as to high school students in that county should be effected by a definite date and that a reasonable date should be fixed as one not later than the beginning of the fall term of the present year of 1956.

Construing the quoted decision as the court's mandate, school officials of Anderson County admitted Negroes as students in Clinton High School at the beginning of the fall term of 1956. Those officials, in obedience to the court-designated time limit, thus put into effect what has become known as integration of Negroes with white students in one of the schools of Anderson County.

[*Application For Restraining Order*]

Almost immediately thereafter, opposition to integration began to express itself in Clinton and neighboring communities, which opposition developed into interference with the functioning of the school itself. As a result of that interference the principal of the school and others on August 29, 1956, presented their petition in which they sought the aid of this court in restraining those directly engaged in such interference and others acting in concert with them "from further hindering, obstructing, or in any wise interfering with the carrying out" of the integration directive of January 4, 1956. On September 6, 1956, the said restraining order or injunction was made permanent. The effect of the court's action in the first situation was to require school officials of Anderson County to admit Negroes of high school grade to the formerly all-white high school of Clinton. This court requirement had the effect of an order which operated upon the school officials. By them it was so construed and obeyed. In the second situation, certain named individuals and all others acting in concert with them were enjoined from interfering with the operation of the first, or desegregation order.

[*Charge Against Defendants*]

These defendants now before you have been charged with having committed acts which obstructed effectuation of desegregation and which by reason of such obstruction resisted, hindered and prevented effective compliance with the court's directive of January 4, 1956, all in violation of the injunction of September 6, 1956. By reason of alleged conduct in defiance of the court's injunction, the defendants stand charged with criminal contempt in violation of Title 18, sec. 401, sub-section 3, of the United States Code. That sub-section defines contempt of court, or contempt of authority, as "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The court's directive that integration be made effective not later than the beginning of the fall

term of school, 1956, has heretofore been quoted. That part of the subsequent injunction which these defendants are charged with having violated is in the following words:

> "It is ordered and decreed by the Court that the aforementioned persons, their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them be and they hereby are enjoined and prohibited from further hindering, obstructing, or in any wise interfering with the carrying out of the aforesaid order of this Court, or from picketing Clinton High School, either by words or acts or otherwise."

Where the foregoing quotation uses the words "aforementioned persons," it refers to certain individuals specifically named in the injunction. That part of the quoted language which relates to ten of the present defendants is the following, to-wit: "all other persons who are acting or may act in concert with them . . ." The "acting in concert" refers back to persons listed as John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton and Mabel Currier. Those named persons were enjoined from hindering, obstructing, or in any wise interfering with the carrying out of the aforesaid order of this Court, "or from picketing Clinton High School, either by words or acts or otherwise."

Of the original six persons enjoined by name, only one is present here as a defendant. That one is John Kasper. The other ten defendants were not named in the injunction, but they are nevertheless charged with having violated it. In the order of attachment under authority of which arrests of the defendants were made, the following language appears:

> "It further appears to this Court that Frederick John Kasper, Alonzo Bullock, Lawrence J. Brantley, William A. Brakebill, Clifford Carter, Clyde Andy Cook, J. L. Coley," no longer a defendant, "also known as J. C. Cooley, Mary Nell Currier, Chris L. Foust," no longer a defendant, "* * * John Brown Long," no longer a defendant, "Edward Henson Nelson, Virgil Cleo Nelson, Zella Nelson," no longer a defendant, "* * * Thomas R. Sanders," no longer a defendant, "Willard H. Till and Raymond Wood, had actual knowledge on or before November 15, 1956 of the final injunction issued by this Court on September 6, 1956; and that the said persons during the months of November and December 1956 entered into an agreement or agreements to violate and to cause others to violate the said permanent injunction issued September 6, 1956; and that said Frederick John Kasper and all of said persons other than said Frederick John Kasper, in active concert and participation with him, have violated the permanent injunction issued by this court on September 6, 1956 by hindering, obstructing, and interfering with the carrying out of the order directing desegregation issued by this Court on January 4, 1956, in the following respects:"

Following the language just quoted the order of attachment enumerates specific or overt acts allegedly committed in furtherance of the alleged agreement or conspiracy entered into with John Kasper. Kasper himself is not charged with having committed any overt act, but is charged only with having entered into the conspiracy. Under the law of conspiracy, however, an overt act of one conspirator in furtherance of the conspiracy is chargeable to all of his co-conspirators.

On the subject of overt acts, the amended order of attachment charges the following:

> "1. On or about November 27, 28, 29, 30 and December 3, 4, 1956, Alonzo Bullock, Lawrence J. Brantley, William A. Brakebill, Clifford Carter, Clyde Andy Cook, J. L. Coley," no longer a defendant, "also known as J. C. Cooley, Mary Nell Currier, Chris L. Foust," no longer a defendant, "John Brown Long," no longer a defendant, "Edward Henson Nelson, Virgil Cleo Nelson, Zella Nelson," no longer a defendant, "Thomas R. Sanders," no longer a defendant, "Willard H. Till, and Raymond Wood, congregated in a threatening manner along the route to the Clinton High School taken by the Negro students and intimidated them from attending Clinton High School."

By way of overt acts, the amended attachment order further charges:

> "2. On December 4, 1956, when Reverend Paul Turner escorted the Negro students to said school, he was vilified and attacked and badly beaten by Alonzo Bullock, Lawrence J. Brantley, William A. Brakebill, Clifford Carter, Clyde Andy Cook, J. L. Coley," no longer a defendant, "also known as J. C.

Cooley, Mary Nell Currier, Chris L. Foust," no longer a defendant, "John Brown Long," no longer a defendant, "Edward Henson Nelson, Virgil Cleo Nelson, and Zella Nelson," no longer a defendant.

By way of summary, ten defendants, Kasper alone not included, allegedly committed the overt acts of congregating in a threatening manner along the route taken by Negro students on their way to Clinton High School on November 27, 28, 29, 30 and December 3 and 4, 1956.

In addition to those overt acts, eight of the same defendants are charged with the overt act of beating a minister who escorted Negro students to said school.

Only the above mentioned overt acts are charged against the defendants, or against any of them. Any other overt acts to which allusion may have been made would have no bearing on the guilt or innocence of the defendants. As to whether the overt acts mentioned are determinative of guilt or innocence, more will be said hereinafter.

In order to establish guilt of the defendants, or any of them, beyond a reasonable doubt, the prosecution must establish the following:

First: That the defendants had actual knowledge of the injunction they are alleged to have violated, together with a reasonable understanding of its contents.

Second: That the alleged overt act or acts were committed in concert with John Kasper.

Third: That the overt act or acts allegedly committed by them had the operative effect of hindering, obstructing or interfering with integration in Clinton High School.

Respecting the first requirement, an injunction is not binding on the public generally. It is binding on those named in it. It is also binding on those persons who have actual knowledge of its having been issued and knowledge of what has been forbidden by the injunction. It is not binding on anyone else. Regardless, therefore, of any overt act of which the defendants may be found to have committed, they are not guilty of criminal contempt for having violated the injunction if they did not know the injunction existed or, if knowing of its existence, they did not know it prohibited the overt act or acts they are charged with having committed. As part of the burden of proving guilt beyond a reasonable doubt the prosecution, therefore, must establish that the defendants did know of the injunction and of the acts forbidden.

Re-examination of the language of the injunction emphasizes the further requirement which must be proved before the injunction becomes operative against these defendants. They do not come within the direct prohibitions contained in the injunction. That which is forbidden to them is action in concert with those named specifically. Applied with particularity here, they are forbidden to act in concert with John Kasper to hinder, obstruct or interfere with integration in the High School at Clinton.

[*Conspiracy Defined*]

Concert of action presupposes a conspiracy between John Kasper and the other defendants. A conspiracy of a criminal nature arises where two or more persons agree to act together to accomplish an illegal objective or to accomplish a lawful objective in an unlawful manner, which conspiracy becomes a crime in fact when an overt act is committed by one or more of the conspirators in pursuit of the agreed objectives. Where a conspiracy exists and an overt act is committed by one of the conspirators pursuant to the conspiracy, that act is chargeable to all who are parties to the conspiracy.

In this connection, the case of defendant Kasper is somewhat different from those of the other defendants. Kasper was one of the named defendants in the original injunction proceeding. He must therefore be charged with having knowledge of the injunction and of its contents. A case of guilt would be made out against him upon the required proof that he entered into a conspiracy or agreement with one or more of the other defendants to hinder, obstruct or interfere with integration at Clinton and that at least one overt act as charged in the order of attachment was committed by one of his co-conspirators. Action in concert with him would not require his presence when the overt act was committed. Action in concert would not require two or more to engage in its commission together. An overt act committed by one conspirator alone would be sufficient to his own guilt as well as the guilt of his co-conspirator, or co-conspirators.

How or by what devices or subtleties a conspiracy arises is not determinative of its existence. In its simplest form a conspiracy to do an un-

lawful act may arise from an exchange of nods or smiles or gestures. Words might be necessary to clarify; they would not be necessary to create a conspiracy. An understanding between two or more persons that they will engage together in an endeavor, either singly or in groups, will, if their endeavor is unlawful or the means unlawful, make them conspirators.

[*Proof of Conspiracy*]

A conspiracy is an agreement, either in express terms or in such concert of intent and understanding as to make it an agreement by implication, between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. It is a partnership in unlawful purposes. If persons in any manner work together to advance an unlawful scheme, having its promotion in view, and being actuated by common purpose and intent to accomplish the unlawful end, they are conspirators. If a person not originally a conspirator learns of it and its unlawful character, and encourages, advises, counsels, or in any manner assists in its prosecution with a view to forwarding the enterprise, he becomes a conspirator. Each person must be actuated by an intent to promote the common design, but each may perform separate acts in forwarding that design. If two persons pursue by their acts the same object, one performing one act, or part on an act, and one another act or another part of the same act, with a view to the attainment of the object they are pursuing, then the jury is at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object. Conspiracy in some form must be shown. It must be established not by suspicion, but by proof. Thereafter, there must be shown an intentional participation in the prosecution to the furtherance of the common design and purpose. If parties in any manner work together or separately to advance the unlawful scheme, having its promotion in view, and actuated by the purpose of accomplishing the common end, they are guilty of furthering the conspiracy.

[*Direct Evidence Not Required*]

By the very nature of the offense, it is almost certain to have had secrecy in its origin. Naturally, every precaution is taken to prevent discovery. It is really seldom to have an actual witness to an unlawful conspiracy. It is generally, therefore, an offense where the evidence and motives or circumstances are to be considered as indicating the course of the offense itself. It is not required, therefore, that the act of conspiracy must necessarily be proven by direct testimony. It is indeed competent to show the conspiracy by showing disconnected, separate acts, when the proof also shows that conspirators were drawn together, or acted through a common medium, and had a common interest in promoting the objects in the conspiracies.

[*Several Conspiracies Possible*]

In addition to Kasper, there are ten defendants in this proceeding. All are charged with having acted in concert with Kasper. That same charge applies separately to each defendant. Establishment of the charge of conspiracy does not require proof that all ten of the other defendants were parties to a common conspiracy with Kasper, or that Kasper conspired with all ten of them as a group. Under the charge contained in the amended order of attachment permission existed for proof of as many as ten separate conspiracies. Defendant Kasper could have conspired with each defendant separately from all the others. But if there had been ten separate conspiracies, the overt act of one conspirator would not have been chargeable to members of the other conspiracies. The overt act of a conspirator is chargeable only to those who are parties to the same conspiracy as that to which he is a party.

[*Acts Must Hinder Integration*]

In addition to the requirement of proof that defendants knew of the issuance of the injunction, had a reasonable understanding of its contents, and acted in concert with defendant Kasper in violating the injunction, the prosecution has the burden of proving that the alleged overt acts, if committed, had the effect of hindering, obstructing, or interfering with integration in Clinton High School.

When integration was ordered, the order was directed to the school officials of Anderson County. Those officials obeyed the order and integration became a fact. But integration, as a fact, ran into difficulties. Those difficulties stemmed from individuals whose acts brought on the issuance of the injunction heretofore so often mentioned. These defendants are charged with having defied the injunction and engaged in acts which hindered, obstructed or interfered with integration, after it became a fact. It was

at such acts as those that the injunction was aimed. The injunction was not issued until after integration had become a fact and its continued existence was threatened.

[*Acts of Defendants*]

Here there are ten defendants. At this point, for convenience, they are referred to as defendant Kasper and the other ten defendants, or simply the ten defendants. The ten defendants are charged with having hindered, obstructed and interfered with integration. The overt act charged as having had that effect is that they on the days heretofore mentioned "congregated in a threatening manner along the route to the Clinton High School taken by the Negro students and intimidated them from attending Clinton High School."

The first step in the problem presented to the jury here is to determine whether the ten defendants, or any of them, did in fact congregate in a threatening manner along said route. The second step in the problem is to determine whether the congregating, if any, had the effect of intimidating Negro students from attending the school. If there was such threatening congregation, and if the same had the alleged effect, then the alleged overt act was committed, that is, there was a hindering, obstructing or interfering with integration.

[*Assault on Minister*]

Eight of the ten defendants, in addition to the alleged congregating aforesaid, are charged with having beaten up a minister after he had escorted Negro students to the high school. By escorting the Negroes to school, the minister had volunteered his services. On that particular morning he had associated himself with the Negroes and either directly or indirectly with integration. From the standpoint of integration what he did was a well-intentioned contribution. Now the jury is called upon to determine whether his being afterwards beaten had the retroactive effect of undoing the good deed done by him earlier in the morning. The beating of the minister is without significance in this proceeding, unless it is clear beyond a reasonable doubt in the minds of the jury that the assault and battery retroactively destroyed the good deed and thus hindered, obstructed and interfered with integration in the school.

[*Acts in Concert Necessary*]

By the way of brief summary, proof of one or the other of the alleged overt acts standing alone is not enough to establish the guilt of any one of the ten defendants. If there was an overt act, it must have been done by a defendant or defendants who had actual knowledge that the injunction had been issued and that the injunction prohibited acts of hindering, obstructing and interfering. But proof of those two requisites is not enough to establish the guilt of any of the ten. The overt act must have been done in concert with John Kasper. If the ten acted independently of Kasper, they did not violate the injunction. Any one or more of the ten who acted independently of Kasper did not violate the injunction. Kasper was the alleged hub of conspiracy. To establish the guilt of any one of the ten, that one must have been a spoke extending back to the hub. If the ten were conspirators only among themselves, they did not violate the injunction. Before any of the ten may be found guilty, all of the three requisites must have been proved beyond a reasonable doubt. Existence of a reasonable doubt as to proof of any one of the three requisites of guilt will require a verdict of not guilty.

[*Proof as to Kasper*]

With final reference to defendant Kasper, it will be recalled that two requisites of proof exist. He is chargeable with knowledge of the injunction and its contents, because he was specifically named in it, made a party to it, and a copy of it was served on him. What is required to be proved as to him is that he conspired with one or more of the ten and that the one with whom he conspired committed an overt act which had the effect of hindering, obstructing or interfering with integration.

The outcome of this litigation depends of course upon the jury's state of mind. That state of mind, in legal contemplation, is the product of the evidence. Preconceived notions of what is right or wrong, wise or unwise, should be no part of that mental product. The issues presented here are fairly simple ones and have been stated and explained in some detail. Those issues should be resolved by the evidence presented in the course of the trial.

[*Credibility of Witnesses*]

It is always within the jury's prerogative to consider the credibility of a witness, to believe him or disbelieve him, to give much weight to his testimony or to give it little weight. Matters which enter into the subject of credibility are the witnesses character as shown in court, his demeanor and manner of testifying, the consistency or inconsistency of his statements, the degree of his intelligence and means of knowledge, any motive which facts indicate he may have had for speaking truthfully or falsely, the damage that may have been done to his testimony by way of cross-examination, and the appearance of inconsistencies, discrepancies or contradictions as to material matters about which the witness testified, conflicts as to immaterial matters do not affect the credibility of the witness. The end product of the evidence, when completely examined and given its just significance, is the jury's state of mind on the question of guilt or innocence.

As a verdict of guilty may be returned only when there exists in the jury mind no reasonable doubt of guilt, it follows that a verdict of not guilty is in order respecting any defendant as to whom there exists a reasonable doubt of guilt.

Under the order of attachment and where the evidence so requires, some or all may be found guilty and others or all not guilty. But a finding of not guilty in favor of the ten defendants would require a finding of not guilty as to defendant Kasper also. As he is charged only with conspiracy, he could not be guilty unless a co-conspirator committed an overt act in concert with him. But a finding that any one of the ten is guilty would require a verdict of guilty against Kasper, also. For none of the ten can be guilty unless he or one of his alleged co-conspirators committed an overt act pursuant to a conspiracy with Kasper, in which event all members of the alleged conspiracy would be guilty.

[*Defendant's Requested Instructions*]

I charge you as requested by the defendants that there is a presumption of rightful conduct and right-doing, as well as the presumption of innocence, and that this presumption of rightful conduct on the part of the defendants while in the cafe, other places that the defendants were acting in a proper, legal and honest manner, and that this presumption continues until evidence is introduced convincing you to the contrary beyond every reasonable doubt.

I further charge you as requested by the defendants that ordinarily a fist fight of the type involved in this proceeding would give rise to a charge of assault and battery or some similar charge in the State court, the County court, or the Municipal court, and would not be a matter for the Federal court to consider. Therefore, in order for you to find that the fist fight between defendant Clyde Cook and Reverend Paul Turner constituted a breach of the injunction of September 6, 1956, the evidence must convince you beyond a reasonable doubt and to a moral certainty that this fist fight occurred as a part of a plan or scheme to interfere with the injunction which prohibited interference with the Court's order barring segregation of the races at Clinton High School. Even if you find that the fight occurred because Cook was angry with Reverend Turner over the matter of segregation, this would not be sufficient to support the charges in this case unless you also found that the purpose or motive of this fight was to impede or interfere with integration at Clinton High School.

[*Duty of Jury*]

I further charge you as requested by the defendants that you are the sole judges of the facts in this case, and it is for you to determine the value or weight you give to a witness' testimony, and if you have obtained any impressions from me in any way regarding the weight to be given the testimony of any witness then you will cast aside such impressions because you are the sole judges of the weight you will give to the testimony of any witness.

The jury is instructed further as requested by the defendants that in determining the guilt or innocence of the defendants you will consider only the testimony adduced from witnesses in this case and you will disregard completely any impressions or information you may have received from other sources such as radio, television, or newspaper articles. In other words, you will consider only the evidence from witnesses in this trial when reaching your verdict in this case.

You may acquit all of the defendants in this case or you may convict all of them. You may acquit some of them and you may convict others.

If you acquit all of the ten defendants, you must acquit Kasper. If you convict Kasper you must convict one or more of the other defendants, because under the law there must be at least two persons to a conspiracy before a conspiracy can exist, and there must be the commission of one or more overt acts in furtherance of the conspiracy in order for any of the alleged co-conspirators to be guilty.

★ ★ ★

Ladies and gentlemen of the jury, I said to you in the course of the charge that from the standpoint of integration what Reverend Turner did was a well-intentioned contribution. From the standpoint of segregation it might not be considered a well-intentioned contribution. Reverend Turner's intention on the occasion in question is immaterial unless it had a bearing on whether or not what was allegedly done to him on the occasion in question was one of the overt acts charged in the amended order of attachment that interferred with the integration of that school. If his intention had any bearing on that question, his intention on the occasion in question is a question of fact for the jury to determine as well as all other questions of fact in this case.

★ ★ ★

Let the regular jury retire for the consideration of the case, and after a verdict is reached return in open court and announce it through your foreman. You will select a foreman from your number. Mr. Marshal, give the jury the amended order for the attachment.

★ ★ ★

EDUCATION
Public Schools—Texas

Hilda Ruth BORDERS, a minor, by her father and next friend, Louie Borders, Jr., et al. v. Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District, et al.

United States Court of Appeals, Fifth Circuit, July 23, 1957, No. 16483.

SUMMARY: In a class action, Negro school children in Dallas, Texas, sought a declaration of rights and injunctive relief in a federal district court with respect to their admission to public schools in that county on a non-segregated basis. The district court refused a motion to convene a three-judge district court, found that the public school facilities furnished for white children and Negroes were substantially equal, and held that the United States Supreme Court's implementation decision in the *School Segregation Cases* required that integration be accomplished on the basis of planning to be done by the school officials and the lower courts. The district court further found that no such plan then existed, and dismissed the suit without prejudice. 133 F.Supp. 811, 1 Race Rel. L. Rep. 318 (N.D. Tex. 1955). On appeal, the Court of Appeals, Fifth Circuit, one judge dissenting, held that there was no basis in the evidence nor in law for the action taken by the district court and vacated, reversed and remanded the cases. *Brown v. Rippy*, 233 F.2d 796, 1 Race Rel. L. Rep. 649 (1956). On the remand the district court, indicating that it would be a "civil wrong" to white pupils to admit Negroes to already crowded white schools, declined to issue an injunction and dismissed the case "in order that the school board may have ample time . . . to work out this problem." *Bell v. Rippy*, 146 F.Supp. 485, 2 Race Rel. L. Rep. 32 (N.D. Tex. 1956). The plaintiffs again appealed to the Court of Appeals for the Fifth Circuit from this dismissal. The Court of Appeals reversed the dismissal and remanded the case to the district court with directions to enter a decree requiring the school officials to desegregate the schools "with all deliberate speed." The court stated that administrative remedies available to the plaintiffs had,

in effect, been exhausted by the refusal of the school officials to admit them to the requested schools and they were not required to pursue further a futile remedy.

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge.

Twenty-eight negro children appeal again to this Court from another judgment of the district court dismissing their complaint[1] in which they sought relief for themselves and other negroes similarly situated on account of their exclusion from certain public schools of Dallas solely because of their race and color.

The basic facts are simple and undisputed. Rosa Sims, ten years of age, and Maude Sims, nine, applied for admission to the John Henry Brown School, four blocks from their home. The school principal showed their father a directive from the School Board "saying that no negro children could go to school with the whites," and denied them the right to enter because they were negroes. Instead, they went to Charles Rice Elementary School distant from their home "about eighteen blocks across heavy traffic." Like treatment from various public schools of Dallas was accorded to each of the other negro children plaintiffs.

The testimony of the Assistant Superintendent and of the Superintendent of the Dallas Independent School District disclosed the steps which had been taken to comply with the school segregation decisions, Brown v. Board of Education, 347 U.S. 483, decided on May 17, 1954, in which the final judgments were entered on May 31, 1955, 349 U.S. 294. On July 13, 1955, the Board of Education made a statement of policy in which it instructed the Superintendent of Schools to proceed with a detailed study in the following areas:

"1. Scholastic boundaries of individual schools with relation to racial groups contained therein.
"2. Age grade distribution of pupils.
"3. Achievement and state of preparedness for grade level assignment of different pupils.
"4. Relative intelligence quotient scores.
"5. Adaption of curriculum.
"6. The overall impact on individual pupils scholastically when all of the above items are considered.
"7. Appointment and assignment of principals.
"8. The relative degree of preparedness of white and negro teachers; their selection and assignment.
"9. Social life of the children within the school.
"10. The problems of integration of the Parent-Teachers Association and the Dads Club Organization.
"11. The operation of the athletic program under an integrated system.
"12. Fair and equitable method of putting into effect the decrees of the Supreme Court."[2]

On July 27, 1955, the following was unanimously approved:

"* * * It was reported that this School System has been, is at present and will be obligated to continue an intensive study of the problems involved in 12 specific areas, and that reports would be made to the public of the results of these studies periodically. It will be impractical to attempt integration until these studies have been completed. Therefore, the Superintendent of Schools is hereby instructed that there shall be no alteration of the present status of the schools of this district in the term beginning September 1955."

Nearly a year later, on June 13, 1956, the Board issued its "Second Statement on Desegregation by the President of the Board" concluding as follows:

"The Board recognizes its responsibility to implement the decree of the Supreme Court, but it reaffirms its studied opinion that it would be derelict in this regard if it ordered an alteration in the status of its schools until its understanding of the problems involved is as comprehensive as possible and its plans for such changes are completed. This Board feels that it cannot and should not in good conscience accept the responsi-

1. The first dismissal is reported in 133 F.Supp. 811, reversed by this Court, 233 F.2d 796. The second dismissal is reported in 146 F.Supp. 485.

2. At the time of the trial on December 19, 1956, the study had been completed in the first five and in the eighth area.

bility for the manner which the decree of the Supreme Court is to be carried out until it has had sufficient time within which to formulate plans which must be to the best interests of this school district, its children, and the community.

* * * * *

"Therefore, for the immediate future this Board feels that any change is premature and instructs the Superintendent of Schools to continue a segregated school system for the school year 1956-1957."

The Assistant Superintendent testified that there were about 119,000 children in the public schools of Dallas of which about 16-2/3 per cent, one out of every six, were negroes. The Superintendent testified that immediate desegregation would result in mixed classes in all of the senior high schools with one possible exception, and in a large number of the elementary schools; that most of the school buildings are completely filled and white children would have to be displaced to let negro children come in; that there is a difference in scholastic aptitudes of white children and negro children, the average difference at the first grade level being one and one-half years, and the older the children the greater the gap, so that in high school senior classes it would run around three and one-half years; that, having that differential in mind, there were not enough teachers available to impart adequate instruction to both negro children and white children; that no child is refused admission because he is retarded. He testified categorically that he was "still continuing segregation based upon races in the Dallas Independent School District."

[*Exhaustion of Remedies*]

The appellees insist that the judgment should be affirmed because of the failure of pleading or proof to show that each plaintiff has exhausted his administrative remedies, under Article 2654-2657 of the Revised Civil Statutes of Texas, by appeal to the State Commissioner of Education. Texas State law gave the Board and the Superintendent the power to act, and, in the exercise of such power, they denied the plaintiffs the right to attend public schools of their choice solely on account of their race or color. By such action the plaintiffs have been deprived of their constitutional rights, and they are not required to seek redress from any administrative body before applying to the courts. Bruce v. Stilwell, 206 F.2d 554, 556 (5th Cir. 1953); Carter v. School Board of Arlington County, Va., 182 F.2d 531, 536 (4th Cir. 1950); Bush v. Orleans Parish School Board, 138 F.Supp. 337, 341 (E.D. La. 1956), affirmed in Orleans Parish School Board v. Bush, 242 F.2d 156, 162 (5th Cir. 1957); see also Browder v. Gayle, 142 F.Supp. 707, 713 (M.D. Ala. 1956), affirmed per curiam 352 U.S. 903.

Other applicable principles of law are equally simple and well understood. Overcrowding in public school rooms cannot be lawfully prevented or relieved by excluding pupils on the basis of their race or color. Clemons v. Board of Education of Hillsboro, 228 F.2d 853, 857 (6th Cir. 1956).

[*Segregation by Race Forbidden*]

The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 241 F.2d 230, 233 (5th Cir. 1957). Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color.

So long as they are excluded from any public school of their choice solely because of their race or color the plaintiffs are being denied their constitutional rights. It is not a sufficient answer to say that the school board has made "a prompt and reasonable start" and is proceeding to a "good faith compliance at the earliest possible date" with the May 17, 1954 ruling of the Supreme Court. The district court must retain jurisdiction to ascertain and to require actual good faith compliance. Brown v. Board of Education, 349 U.S. 294, 299, 301; Avery v. Wichita Falls Independent School District, 241 F.2d. 230, 235 (5th Cir. 1957).

We do not impugn the good faith of the Board, of the Superintendent, or of any of the school authorities. Indeed, we note with appreciation the sincere statement of their counsel that "* * * it is to be hoped that the aftermath which occurred in Mansfield will not be similar in Dallas." Faith by itself, however, without works, is not enough. There must be "compliance at the earli-

est practicable date." Brown v. Board of Education, 349 U.S. 294, 300 (1955); School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59, 64 (4th Cir. 1956); Willis v. Walker, 136 F.Supp. 177, 181 (W.D. Ky. 1955).

In their prayer on this appeal, appellants are moderate. They do not pray for any immediate or en masse desegration, but, recognizing that still further time may be needed for the admittedly difficult problems to be solved even if they are approached in a spirit of good will on all sides, their prayer is:

"Wherefore, appellants pray that the judgment below be reversed and that the court below be instructed to enter an order requiring appellees to desegregate the school under their jurisdiction 'with all deliberate speed.'"[3]

At least to that much they are certainly entitled, and it is so ordered and adjudged. See 28 U.S.C.A. §2106.

REVERSED WITH DIRECTIONS.

3. See the form of judgment in Bush v. Orleans Parish School Board, 138 F.Supp. 337, 342 (E.D. La. 1956), affirmed 242 F.2d 156.

EDUCATION
Public Schools—Virginia

The SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, Virginia, et al. v. Jerome A. ATKINS et al.

The SCHOOL BOARD OF THE CITY OF NORFOLK, Virginia, et al. v. Leola Pearl BECKETT et al.

United States Court of Appeals, Fourth Circuit, July 13, 1957, Nos. 7430 and 7438.

SUMMARY: In similar class actions filed in federal district court, Negro school children in Norfolk and Newport News, Virginia, sought to require school officials to admit them to public schools without discrimination on the basis of race or color. Similar motions to dismiss, on general grounds, were filed by the defendant school officials in each case and later supplemental motions to dismiss were filed. The supplemental motions were grounded on the proposition that the pupil plaintiffs had not exhausted the administrative remedies afforded them by the recently enacted Virginia "Pupil Placement Act" (Ch. 70. Va. Acts of 1956, 1 Race Rel. L. Rep. 1109). The two cases were consolidated for a hearing on the motion to dismiss. The district court held the placement act to be unconstitutional on its face because it required the Pupil Placement Board to consider the race of the child in making assignments to schools. The court further stated that the remedy afforded by the act, even if not unconstitutional, was not an adequate remedy which the pupil would be required to exhaust before proceeding with court action. The motions to dismiss were overruled. 148 F.Supp. 430, 2 Race Rel. L. Rep. 46 (E.D. Va. 1957). At a further hearing on the merits of the case, the court, finding that the school board had indicated no purpose to begin a good faith compliance with desegregation, issued an injunction ordering the schools to be opened without regard to race or color beginning with the September, 1957, term. The court, however, retained jurisdiction of the case and indicated, that, on a proper showing, its order might be modified. 2 Race Rel. L. Rep. 334, 337 (E.D. Va. 1957). On appeal the Court of Appeals, Fourth Circuit, affirmed. That court held that a three-judge district court was not required to determine the constitutionality of the Pupil Placement Act because the enforcement of that act had not been

enjoined. The court found the decree enjoining segregation to be reasonable under the circumstances.

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, Circuit Judges.

PER CURIAM.

These are appeals from injunctive decrees forbidding racial discrimination in the public schools of Norfolk and Newport News, Virginia, and are controlled in all material respects by our decision in the City of Charlottesville and Arlington County cases. School Board of City of Charlottesville, Virginia v. Allen 4 Cir. 240 F.2d 59, cert. den. 353 U.S. 910. It is argued that, on the authority of Carson v. Warlick 4 Cir. 238 F.2d 724, the cases here should be dismissed or proceedings therein be stayed until administrative remedies have been exhausted under the recent Pupil Placement Act, ch. 70 Acts of Assembly of Virginia, extra session 1956. As pointed out by the judge below, however, this statute furnishes no adequate remedy to plaintiffs because of the fixed and definite policy of the school authorities with respect to segregation and because of the provisions of chapter 68 of the Acts of the extra session, which provide for the closing of schools and withdrawal therefrom of state funds upon any departure from this policy in any school. Orleans Parish School Board v. Bush 5 Cir. 242 F.2d 156, 162, cert. den. 25 L.W. 3374, ...U.S.....

[*Three-judge Court Not Required*]

It is argued that the court was without jurisdiction of the cases and that only a three-judge court would have had jurisdiction because the constitutional validity of the Pupil Placement Act was involved. This question was not raised, however, in the applications for injunction, which were filed before the passage of that act and which merely sought the protection of constitutional rights in a suit for the hearing of which a court of three judges was not required. Davis v. County School Board of Prince Edward County 142 F. Supp. 616. After the passage of the act motion was made to dismiss the cases on the ground that the act provided an administrative remedy which had not been exhausted. The trial judge held, as to this, that the act did not provide an adequate administrative remedy and that it was unconstitutional when considered in connection with other statutes passed at the same time and its manifest purpose. Cf. Yick Wo v. Hopkins 118 U.S. 356, 373-374. As no injunction was asked or granted against the enforcement of the act or the officials charged with its enforcement, a case for the constitution of a three-judge court was not presented, even though the constitutionality of an act relied on in the motion to dismiss was involved. 28 USC 2281; Bush v. Orleans School Board 138 F. Supp. 336, s.c. 138 F. Supp. 337, 341, aff. 5 Cir. 242 F.2d. 156, 164-165, cert. den. 25 L.W. 3374, ...U.S...... For like reason, there is no occasion to stay proceedings pending action by the Supreme Court of Appeals of Virginia on a case involving validity of the act.

[*Effect of Decrees*]

It should be noted that the decrees appealed from do not require the assignment of children to particular schools nor do they require mixing of races in any school. They merely forbid defendants from refusing to admit plaintiffs to any school solely on account of race or color. The operative language of the decrees is as follows:

> "1. That the defendants, and each of them, their successors in office, agents, representatives, servants, and employees, be, and they hereby are, restrained and enjoined from refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to, and enrollment and education in, such school."

In construing very similar language used in his decree in the Arlington case, Judge Bryan used the following language which was quoted by us in our opinion on appeal (240 F.2d at 62):

> "It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] and 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083] do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any

school system has been commanded. The order of the Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

That language is applicable to the cases before us, as is the closing language of our opinion in that case wherein we said:

"The decrees here are not harsh or unreasonable but merely require that the law be observed and discrimination on the ground of race be eliminated. The Arlington decree expressly states that local rules as to assignment to classes, so long as such rules are not based on race or color, are to be observed, and that administrative remedies for admission to schools must be exhausted before application is made to the court for relief on the ground that its injunction is being violated. While the Charlottesville decree does not contain this express provision, the provision is so eminently reasonable that we may safely assume that enforcement of that decree will not proceed upon different principles."

Affirmed.

EDUCATION
Public Schools—Virginia

Clarissa S. THOMPSON et al. v. County SCHOOL BOARD OF ARLINGTON COUNTY, Virginia, et al.
United States District Court, Eastern District, Virginia, July 27, 1957, Civ. No. 1341.

SUMMARY: In a class action in federal district court, Negro school children in Arlington County, Virginia, had obtained an injunction against county school officials requiring their admission to schools without discrimination on the basis of race. 144 F.Supp. 239, 1 Race Rel. L. Rep. 890 (E.D. Va. 1956). On appeal the Court of Appeals for the Fourth Circuit affirmed, holding, in part, that the Virginia Pupil Placement Act was inapplicable to the case. 240 F.2d 830, 2 Race Rel. L. Rep. 59 (1956); *cert. denied*, 77 S.Ct. 667, 2 Race Rel. L. Rep. 299 (1957). A motion was then made to the district court to amend the decree, which had required the removal of discrimination by January, 1957, for elementary students and September, 1957, for junior and senior high schools. The school officials also moved to have the decree suspended pending a ruling by the Supreme Court on another case involving the constitutionality of the Pupil Placement Act (see p. 808). The court amended the decree so as to require admission of all school children on a racially non-discriminatory basis beginning in September, 1957, but declined to suspend the operation of the injunction. The court stated that the possible application of the Pupil Placement Act would be reached by it only in the event of a petition to enforce the injunction.

BRYAN, District Judge.

MEMORANDUM ON MOTION TO AMEND DECREE

I. To render it current, the decree of July 31, 1956 will be amended so that its injunction will become effective in respect to elementary schools at the commencement of the 1957-1958 session in September 1957. This date has heretofore been fixed, and should stand, for the inception of the injunction in regard to secondary schools. Deferment of its effectuation, asked by the defendants, is not warranted in the circumstances of this case.

Specifically, the defendants request suspension of the injunction while review is sought in the Supreme Court of the recent adverse judgment, in other litigation, of the Court of Appeals for this circuit upon the Pupil Placement Act of Virginia. Declaring that the Act does not pro-

vide an adequate administrative remedy, the judgment there dispenses with compliance with the Act as a prerequisite to application to the court for an injunction against the maintenance of segregation. But here the right to an injunction has already been established. Consideration of administrative remedies will not again be reached unless and until petition is made to enforce the injunction. Plainly, therefore, commencement of the restraint laid in the decree should not be postponed to a determination of the validity of an administrative remedy.

If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting, his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and precision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand.

II. The court must deny the plaintiffs' request that the decree be enlarged to include a declaration paralleling the ruling of the Court of Appeals, in effect allowing students to bypass the Pupil Placement Act. The sufficiency of the Act has not been previously an issue in this suit and is now advanced prematurely. Also, a ruling on it now would be unwise, because for neither party is it in an appealable posture. Finally, the holding of the Court of Appeals is in abeyance pro tempore.

With propriety, however, we can observe that quite obviously the July 31, 1956 decree recognizes only an adequate administrative remedy—one that is efficacious and expeditious, even apart from any question of its constitutionality. Pursuit of an unreasonable or unavailing form of redress is not exacted by the decree.

III. Statutory costs will be awarded in accordance with the motion.

EDUCATION
Private Schools—Pennsylvania

In Re: ESTATE OF STEPHEN GIRARD [Appeals of William Ashe Foust, Robert Felder, City of Philadelphia, Philadelphia Commission on Human Relations, Mayor of City of Philadelphia, and Commonwealth of Pennsylvania]

Supreme Court of Pennsylvania, Nos. 167 etc., June 28, 1957.

SUMMARY: The will of Stephen Girard, who died in 1831, established a trust for the education of "poor white male orphans." The trust is administered now by a Board of City Trusts, consisting in part of elected officials of the City of Philadelphia and members appointed by the judges of courts of common pleas of the county. An eight-year-old Negro boy applied for admission to Girard College. His application was refused because he was not "white." Together with other rejected Negro applicants, he filed a petition in the Orphan's Court of Philadelphia County, claiming the limitation to "white" persons was invalid and seeking a review of the denial of his admission. That court denied the application, holding that the operation of Girard College by the Board of City Trusts pursuant to terms of the will is not "state action" under the Fourteenth Amendment to the United States Constitution (see 1 Race Rel. L. Rep. 613) and that the decision in the *School Segregation Cases* is not applicable since the College is not a public institution. 1 Race Rel. L. Rep. 325 (1955). The full bench of the Orphan's Court of Philadelphia County affirmed. 4 D. & C. 2d 671, 1 Race Rel. L. Rep. 340 (1956). The Pennsylvania Supreme Court, one justice dissenting, upheld the decision of the Orphan's Court denying the petition for admission, stating that the activity of public officials in administering the trust is not to be construed as "state action." 386 Pa. 548, 127 A.2d 287, 2 Race Rel. L. Rep. 68 (1956). The United States Supreme Court dismissed the appeal but, treating the appeal as a petition for writ of certiorari, reversed and remanded the case for further proceedings not inconsistent with its opinion. The per

curiam opinion of the Supreme Court states that the "Board which operates Girard College is an agency of the State of Pennsylvania [and] . . . its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the state [which is] . . . forbidden by the Fourteenth Amendment." Sub nom. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230, 77 S. Ct. 806, 2 Race Rel. L. Rep. 591 (1957). On the remand to the Pennsylvania Supreme Court, that court remanded the case to the Orphan's Court for further proceedings. Two justices dissented from the order of remand. One of the dissenting justices would have directed the removal of the Board of City Trusts as trustee under the will. The other dissenting justice would have directed the immediate admission of the applicants to Girard College.

Before JONES, C. J., and BELL, CHIDSEY, MUSMANNO, ARNOLD and Benjamin JONES, JJ.

PER CURIAM.

ORDER

WHEREAS, the Supreme Court of the United States, by order of April 29, 1957, on certiorari, reversed with costs the judgment of this Court (386 Pa. 548, 570) affirming the decrees of the Orphans' Court of Philadelphia County, at No. 10 July Term 1955, in the above entitled estate, which decrees were the subjects of appeals to this Court at the above numbers and term;

NOW, THEREFORE, in obedience to the mandate of the Supreme Court of the United States, a true and correct copy whereof is appended hereto,—

The decrees of the Orphans' Court of Philadelphia County are vacated at the appellee's costs and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate.

Done at Philadelphia, Pennsylvania, this 28th day of June, A. D. 1957.

BY THE COURT
CHARLES ALVIN JONES
Chief Justice.

Mr. Justice Cohen took no part in the consideration or disposition of this matter.

MR. JUSTICE BELL files a dissenting opinion.

MR. JUSTICE MUSMANNO files a dissenting opinion.

Mandate of U. S. Supreme Court

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, EASTERN DISTRICT, GREETING:

WHEREAS, lately in the Supreme Court of the Commonwealth of Pennsylvania, Eastern District, before you, or some of you, in a cause entitled In Re: Estate of Stephen Girard, Deceased, involving appeals from the Decrees of the Orphans' Court of Philadelphia County as of No. 10 July Term, 1885, by William Ashe Foust, Robert Felder, City of Philadelphia, Philadelphia Commission on Human Relations, Richardson Dilworth, Mayor of the City of Philadelphia, and Commonwealth of Pennsylvania, Nos. 167, 168, 175, 176, 177, 178, 179, 180, 202, 203, January Term, 1956, wherein the judgment of said Supreme Court affirming the decrees of the Orphans' Courts affirming the action of the Board of Directors of City Trusts, Trustee of the Estate of Stephen Girard, in dismissing the applications of William Ashe Foust and Robert Felder for admission to Girard College was duly entered on the 12th day of November A. D. 1956, and wherein the said Supreme Court on the 20th day of December A. D. 1956 entered an order denying appellants' petition for reargument, as by the inspection of the transcript of the record of the said Supreme Court which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-six, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was duly submitted.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court as follows:

Stephen Girard by a will probated in 1831, left a fund in trust for the erection, maintenance, and operation of a "college". The will provided that the college was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The will named as trustee the City of Philadelphia. The provisions of the will were carried out by the State and city and the college was opened in 1848. Since 1869, by virtue of an act of the Pennsylvania Legislature, the trust has been administered and the college operated by the "Board of Directors of City Trusts of the City of Philadelphia." Pa. Laws 1869, No. 1276; Purdon's Pa. Stat. Ann., 1957, Tit. 53, Sec. 1365.

In February 1954, the petitioners Foust and Felder applied for admission to the college. They met all qualifications except that they were Negroes. For this reason the Board refused to admit them. They petitioned the Orphans' Court of Philadelphia County for an order directing the Board to admit them, alleging that their exclusion because of race violated the Fourteenth Amendment to the Constitution. The State of Pennsylvania and the City of Philadalphia joined in the suit also contending the Board's action violated the Fourteenth Amendment. The Orphans' Court rejected the constitutional contention and refused to order the applicants' admission. 4 D. & C. 2d 671 (Orph. Ct. Philadelphia). This was affirmed by the Pennsylvania Supreme Court, 386 Pa. 548.

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed with costs.

IT IS FURTHER ORDERED that the Commonwealth of Pennsylvania et al. recover from the Board of Directors of City Trusts of the City of Philadelphia One Hundred Dollars ($100) for their costs herein expended.

IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the Supreme Court of Pennsylvania, Eastern District, for further proceedings not inconsistent with this opinion. April 29, 1957

And the same is hereby remanded to you, the said judges of the said Supreme Court of the Commonwealth of Pennsylvania, in order that such proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States the eleventh day of June, in the year of our Lord one thousand nine hundred and fifty-seven.

Costs of Commonwealth of Pennsylvania et al.		:
Clerk	$100.00	:
Printing		:
Record	0.00	:
	$100.00	:

JOHN T. FEY
Clerk of the Supreme Court of the United States,
By R. J. BLANCHARD, Deputy."

DISSENTING OPINION

BELL, J.

The Supreme Court of the United States, by order of April 29, 1957, on certiorari, reversed the judgment of this Court (386 Pa. 548, 570), which affirmed the decrees of the Orphans' Court of Philadelphia County.

The pertinent part of the Opinion of the Supreme Court is as follows:

"The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed with costs.

"IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the Supreme Court of Pennsylvania, Eastern District, for further proceedings not inconsistent with this opinion."

We believe the Supreme Court held that since Stephen Girard's testamentary trust for Girard College *was administered by* the Board of Directors of City Trusts of the City of Philadelphia which "is *an agency of the State* of Pennsylvania . . . . Its refusal to admit Foust and Felder to the College because they were Negroes *was discrimination by the State* [which] is forbidden by the Fourteenth Amendment". The Supreme Court did not direct the admission of Foust and Felder to Girard College, which it could easily and clearly have done in one sentence if that had been its intention.* Instead, it remanded the case to *the Supreme Court of Pennsylvania* "for further proceedings not inconsistent with this opinion."

The Supreme Court of the United States and the Supreme Court of Pennsylvania have repeatedly held, as Girard himself clearly and specifically provided, that Girard's primary, dominant and paramount intent was to provide a college and orphanage home for "poor white male orphans". Can that be accomplished and carried out without violating the Constitutional prohibition against discrimination by the State?

[*Manner of Accomplishing Intent*]

For centuries it has been the law in England, in Pennsylvania, and in the United States that where the position or interests of a trustee conflict with or are detrimental to the terms, purposes or objectives of a charitable trust, or where, for any reason whatsoever, the trustee is unable to administer the trust in accordance with its terms and purposes, the trustee shall be removed by the Court which has jurisdiction of the trust, since the purposes and objectives of the trust are more important and must be preserved. In such a case the trust shall continue under the administration and pursuant to the appointment of a new trustee whose status and interest permits him to faithfully carry out the purposes and provisions of the trust. This is hornbook law. Vidal v. Girard's Executors, 43 U.S. 127, 140; Girard v. Philadelphia, 74 U.S. 1; Restatement of the Law of Trusts, §387, page 1181. See also: Hodgson's Estate, 342 Pa. 250, 259. 20 A. 2d 294; May v. May, 167 U.S. 310; 90 C.J.S. Trusts §232.

*What the Supreme Court of the United States says is the law is, of course, the law, and must be obeyed by every Judge and every citizen in Pennsylvania, no matter how strongly he may disagree with the decision or the mandate of the Court.

In Restatement of Trusts, the law is thus stated §387, page 1181: "§387. REMOVAL OF TRUSTEE. A court may remove a trustee of a charitable trust if his continuing to act as trustee would be detrimental to the accomplishment of the purposes of the trust."

In Hodgson's Estate, 342 Pa., supra, the Court said (page 259): "In May v. May, 167 U.S. 310, which was a case where a testamentary trustee had been removed from office, the Supreme Court of the United States said: 'The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever . . . his continuance in office would be detrimental to the execution of the trust, . . .'."

In Brown v. Board of Education, 347 U.S. 483, which was the basis for the Court's opinion, the issue was the right of colored boys to attend a *public* school on an integrated basis with white students and the Court held that denial of that right was discrimination by the State. In the instant case--absent a State agency as trustee--there exists nothing but a *private* charitable trust which is operated and administered solely by and with money from Girard's own estate. Such trusts are favorites of the law and have been upheld for centuries. Jordan's Estate, 329 Pa. 427, 197 A. 150; Daly's Estate, 208 Pa. 58, 66, 57 A. 180; 14 C.J.S. §6, page 427; 10 Am. Jur. §12, page 593, §102 Page 657; 3 Page on Wills, §1214, page 560-561.

In Wilson v. Board of City Trusts, 343 Pa. 545, 188 A. 588, we held that the trust for Girard College created by the Will of Stephen Girard is within the jurisdiction of the Orphans' Court.

I would make the following Order:

NOW, THEREFORE, in obedience to the mandate of the Supreme Court of the United States, the decrees of the Orphans' Court of Philadelphia County are vacated; the cause is remanded to the Orphans' Court of Philadelphia County with directions to remove the Board of City Trusts as trustee under the will of Stephen Girard and to appoint substituted trustees none of whom shall be an officer or employee of the Commonwealth of Pennsylvania or of the City of Philadelphia or of any Agency of the State or City; and to take further proceedings as justice may require which are not inconsistent with the directions of this opinion

or with the opinion and mandate of the Supreme Court of the United States.

I am convinced that such an Order is both wise and necessary; it will eliminate intolerable legal delays and expedite Justice.

DISSENTING OPINION

MUSMANNO, J.

I believe this Court errs in remanding this case to the Orphans' Court of Philadelphia with an order which permits the Orphans' Court to readjudicate a matter already definitively adjudged by the Supreme Court of the United States. The mandate of the Supreme Court of the United States is final and must be obeyed. The decisions of the Supreme Court of the United States are the law of the land and cannot be reversed, modified, or altered except through constitutional means.

This court may not authorize the Orphans' Court to do anything contrary to what the Supreme Court of the United States has decided.

Since the Orphans' Court refused to admit into the Girard College the applicants, William Ashe Foust, and Robert Felder, and the Supreme Court of the United States has declared this to be error, the only possible interpretation of the mandate of the United States Supreme Court is that the applicants should now be admitted to Girard College, and I believe this Court should enter an order to that effect.

GOVERNMENTAL FACILITIES
Public Housing—Kentucky

Leola ELEBY et al. v. CITY OF LOUISVILLE MUNICIPAL HOUSING COMMISSION et al.

United States District Court, Western District, Kentucky, May 24, 1957, Civ. No. 3240.

SUMMARY: Negroes in Louisville, Kentucky, brought an action in federal district court against the Municipal Housing Commission and other city officials to require their assignment to public housing projects without regard to race or color. At pre-trial conferences the court indicated that the admission of the plaintiffs to public housing projects on a racially nondiscriminatory basis was required in accordance with *Detroit Housing Commission v. Lewis*, 226 F.2d 180, 1 Race Rel. L. Rep. 159 (6th Cir. 1955). The Housing Commission then proposed a plan for integrating the housing projects over a period of time contigent upon the completion of additional construction. The court approved the plan but set a limit of one year on the completion of integration and retained jurisdiction of the case to supervise the progress of the plan.

BROOKS, District Judge.

ORDER UPON PRE-TRIAL CONFERENCE

On this date J. Earl Dearing, counsel for the plaintiffs, and N. H. Dosker and Leo T. Wolford, counsel for the defendants, met with the Court in Chambers for a pre-trial conference.

The defendants, City of Louisville Municipal Housing Commission, filed herein a proposed Plan of Integration which it agrees to adopt, if approved by the Court. The Court being advised.

IT IS ORDERED:

1. That the proposed Plan of Integration be and it is hereby approved.

2. The defendants, City of Louisville Municipal Housing Commission shall begin to take such steps as shall look toward the ultimate effectiveness of such Plan so that the Plan can become fully effective not later than one year from the date of this order.

3. This case shall be retained on the docket and the Court shall retain jurisdiction thereof in order that either party may from time to time report to the Court as to the progress or lack of progress which is being made toward the ultimate effectiveness of such Plan, and in order that

either party may from time to time apply to the Court for such orders as may be called for so that such integration may be accomplished in a gradual, peaceable and orderly manner.

The plaintiffs shall have the right to take proof if they so desire to show that the time allowed is unreasonable to fully effectuate the Plan.

PLAN OF INTEGRATION

The defendant, City of Louisville Municipal Housing Commission (hereinafter called the Commission) hereby proposes the adoption of the following plan for integration of White and Negro families in the nine low rent Public Housing Projects under its jurisdiction.

1. Since 1937, when the first Public Housing Projects under the jurisdiction of the Commission were constructed, four of the projects have been occupied by White families and four of the projects have been occupied by Negro families. The project now under construction was contemplated to be made available to Negro families. Such practice grew up without the adoption of any rule or regulation of any kind requiring occupancy in any particular project to be either White or Negro, but in practice there has been this separation. So far as the Commission is able to determine there has been no dissatisfaction with such practice. There has never been a request by any White applicant to occupy a dwelling unit in a project made available for Negro occupancy, and there has never been a request by any Negro applicant to occupy a dwelling unit in any project made available for White occupancy.

2. There has never been any discrimination between White and Negro applicants or White or Negro tenants. The projects were built in pairs and the facilities made available for White and Negro occupancy are exactly the same and have been maintained that way.

Although the population of the City of Louisville is only about 16% Negro, as soon as the project now under construction is completed there will be the same number of units available for Negro occupancy as are available for White occupancy.

The Commission is made up of three White members and one Negro member.

3. Virtually all of the units are now occupied except (*a*) there is a constant turn over; and (*b*) in Parkway Place at 13th and Hill Streets, which has heretofore been made available for White occupancy, the Commission has been authorized to convert, and is now in the process of converting sixty (60) two bedroom units into forty (40) four bedroom units in order to provide facilities for larger families, as is being provided for in the project now under construction known as KY. 1-9 in the Southwick area.

4. When this plan becomes effective the Commission proposes to permit all applicants to request occupancy in projects heretofore made available for White or Negro occupancy regardless of race or color, and to give due consideration to such requests, regardless of race or color, and will as far as possible place such applicants in available units for which they are eligible under the eligibility rules of the Commission and of the Public Housing Administration, an agency of the United States.

In considering such requests, the Commission will not compel a White applicant against his wishes to occupy a unit in a project which is occupied predominantly by Negro tenants nor compel a Negro applicant to occupy a unit in a project which is occupied predominantly by White tenants. In assigning applicants to public low rent housing units, the Commission will continue to exercise its administrative and managerial functions under KRS 81.180, and under the United States Housing Act of 1937, as amended, and under the rules and regulations promulgated under said act by the Housing and Home Finance Agency and the Public Housing Administration.

The Commission reserves the right to assign applicants to units in projects other than those preferred by them without regard, however, to distinctions on account of race or color; and the Commission will endeavor to meet the desires of all applicants as far as it is possible to do so.

STATEMENT BY COMMISSION

The City of Louisville Municipal Housing Commission today, pursuant to the Court's direction, adopted a plan for the voluntary and gradual integration of public housing projects.

At a pretrial conference, Judge Brooks pointed out that he is bound by the decision of the Sixth Circuit Court of Appeals in which Louisville is located in the Detroit Housing Case (Detroit Housing Com. v. Lewis, 226 F.2d. 180) to require the adoption of an integration plan.

The Commission believes that the adoption of this plan when it becomes effective will accomplish the change in a peaceable and orderly manner, will meet the legal requirements, and will be fair to both Whites and Negroes by permitting requests for integration and granting such requests regardless of race or color as far as possible.

Since the low rent housing projects were begun in Louisville in 1937, there had never been any rule or regulation of the Commission requiring the separation of races, but in practice the projects had been built in pairs so that whenever a project available for Negro occupancy was constructed a White project was constructed and made available for White occupancy.

All during this time these projects were planned, constructed and operated under the "separate but equal" doctrine, which was then the law, and were admittedly operated without any racial discrimination.

The Commission is made up of three White members and one Negro member. That there has been no discrimination against Negroes is shown by the fact that although only 16% of the City's population is Negro, the Commission has provided the same number of units available for Negro occupancy as are available for White occupancy. There has never been a request by a White applicant to occupy a dwelling unit in a project made available for Negro occupancy and there has never been a request by a Negro applicant to occupy a dwelling unit in a project made available for White occupancy.

The Commission believes that the proposed plan will not materially change the present occupancy but will incorporate the voluntary principle.

Practically all of the available units are now occupied under lease although there is a constant turn over. The Commission proposes that when the plan is effective all applicants will be permitted to request occupancy in projects heretofore made available for White or Negro occupancy regardless of race or color, and the Commission will give due consideration to such requests. The Commission will not compel a White applicant against his wishes to occupy a unit in a project which is occupied predominantly by Negro tenants nor compel a Negro applicant against his wishes to occupy a unit in a project which is occupied predominantly by White tenants.

The Commission also reserves its administrative and managerial functions under the State Law and Federal regulations, including the right to assign applicants to units in projects other than those preferred by them, however, without distinction on account of race or color.

While this plan was adopted by the Commission as its policy, Judge Brooks authorized the Commission to take one year additional time to prepare for operation under the plan.

GOVERNMENTAL FACILITIES
Golf Courses—North Carolina

CITY OF GREENSBORO and the Gillespie Park Golf Club, Inc. v. George SIMKINS et al.

United States Court of Appeals, Fourth Circuit, June 28, 1957, No. 7450.

SUMMARY: Six Negro citizens of Greensboro, North Carolina, were convicted in a state court and given sentences of confinement for criminal trespass for having attempted to use the Gillespie Park Golf Course without permission of the manager. [The judgments have been arrested, on technical grounds, on appeal to the North Carolina Supreme Court, see p. 818]. The defendants in that case, together with others, then brought an action in federal district

court in North Carolina seeking injunctive relief and a declaratory judgment as to their right to use the golf course. The golf course, although municipally owned, had been leased by the city to a corporation and the action was brought against the city and the corporate lessee. The city conceded that it could not constitutionally deny Negroes the use of municipal facilities while permitting their use by white persons but maintained that the denial of use of the golf course was done by the corporate lessee and not the city. The court held that the right to use the golf course "can not be abridged by the lessee; so long as the course is available to some of the citizens as a public park it can not be lawfully denied to others solely on account of race." The court entered a decree restraining the defendants from discriminating against the plaintiffs or other Negro residents of the city in the use of the course and from disposing of the golf course other than by a bona fide sale. 149 F.Supp. 562, 2 Race Rel. L. Rep. 605 (M.D. N. C. 1957). On appeal the Court of Appeals for the Fourth Circuit affirmed. The court held that the provision in the district court's decree restraining the city from disposing of the golf course was reasonable under the circumstances.

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, Circuit Judges.

PER CURIAM.

This is an appeal from an order granting an injunction against racial discrimination in the operation of a golf course of the City of Greensboro. The defendents were the City of Greensboro which had constructed the course, partly with funds furnished by the Federal Works Progress Administration, the Greensboro City Board of Education, which owned a part of the land upon which the course was constructed, and the Gillespie Park Golf Club, which operated the course under lease from the city and the Board of Education and which excluded Negroes from the right to play on the course. It is perfectly clear that the injunction was properly granted. Dawson et al. v. Mayor and City Council of Baltimore and Lonesome v. Maxwell. 4 Cir. 220 F.2d 386, aff. 350 U.S. 877; Holmes v. Atlanta 350 U.S. 879; Department of Conservation and Development v. Tate 4 Cir. 231 F.2d 615, affirming 133 F. Supp. 616; Plummer et al. v. Case 5 Cir.———F.2d———; Lawrence v. Hancock 76 F. Supp. 1004, 1009. Complaint is made of the provision of the order forbidding disposition of the golf course except by bona fide sale. It is clear, however, that the provision was inserted merely to prevent evasion of the court's order forbidding racial discrimination in the operation of the property; for it was followed by a reservation retaining jurisdiction and the power to modify the provision upon application of any of the parties. As pointed out in the Tate case, supra, the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property. The city may, however, under the terms of the order, part with ownership of the property by bona fide sale; and the court, under the power reserved, will doubtless approve other dispositions if they will not result in unlawful discrimination against citzens on the ground of race or color. Any error in the exercise of the power thus reserved will, of course, be subject to review by this court.

Affirmed.

GOVERNMENTAL FACILITIES
Golf Courses—North Carolina

STATE of North Carolina v. Phillip COOKE et al.

Supreme Court of North Carolina, June 11, 1957, No. 580-Guilford

SUMMARY: Six Negro citizens of Greensboro, North Carolina, applied for and were denied permission to play on a municipally-owned golf course which had been leased to a private operator. When they attempted to play without permission they were arrested and charged with trespass. From a conviction for trespass in a municipal court they appealed to the superior court where they were again convicted. They then appealed to the North Carolina

Supreme Court. The court found that the original warrants under which they had been convicted were defective in that the name of the lessee of the golf course was erroneously entered and that there was no provision for amendment under North Carolina Law. [The defendants in this case were plaintiffs in an action in federal district court brought against the city. In that case the court enjoined the city and the lessee of the golf course in question from denying admission to the golf course solely on the basis of race or color. *Simkins v. City of Greensboro*, 149 F.Supp. 562, 2 Race Rel. L. Rep. 605 (M.D. N.C. 1957); affirmed, see above.]

[STATEMENT OF FACTS BY THE COURT]

Appeals by defendants from Burgwyn, E. J., December 1956 Criminal Term of Guilford (Greensboro Division).

On 7 December 1955 six warrants issued from the Greensboro Municipal-County Court on affidavit of Ernest Edwards charging the defendants therein named "did unlawfully and willfully trespass upon the property of Gillespie Park Golf Course, Greensboro, North Carolina, after having been forbidden to do so." The cases were heard in the Municipal-County Court on 6 February 1956. Each defendant was found guilty, and from the sentence imposed each appealed to the Superior Court. The cases were by consent consolidated for trial in the Superior Court.

Ernest Edwards, on whose affidavit the warrants issued, testified: "I'm employed as a golf professional manager of the Gillespie Park Golf Club, Incorporated. The golf club is an 18-hole club with club house. It's located on Asheboro Street and Randolph Avenue on the new Super Highway . . . . Back on the 7th day of December, 1955, I was employed as manager of Gillespie Park Golf Course, Incorporated. At that time one of my functions was to operate the Gillespie Park Golf Course."

He was asked: "On that date, the 7th day of December, 1955, state whether or not the corporation was in possession of the Gillespie Park Golf Course. A. It was."

Witness testified that defendants, on the date named, over his protest, played golf on the course.

When the State rested, defendants moved for nonsuit. Before the motion was heard, the solicitor asked the court to reopen the case so that he might make a motion to amend the warrants. His request was granted; whereupon, over the objection of defendants, the warrants were amended to read: "Did unlawfully and willfully enter and trespass upon the premises of *Gillespie Park Golf Club, Inc.*, after having been forbidden to enter said premises and not having a license to enter said premises against the statute in such cases made and provided and against the peace and dignity of the State." (Italics added.)

After the warrants were amended, defendants offered a lease by the City of Greensboro to Gillespie Park Golf Course, Inc., dated 7 April 1949, for a term of one year, of the city's club house and golf course. Renewals of this lease were offered in evidence, the last renewal bearing date 2 April 1953 extending lessee's term to 6 April 1958.

The jury returned a verdict of guilty as to each defendant. Judgments were entered on the verdicts and defendants appealed.

[OPINION]

RODMAN, J. The crime of which defendants stand convicted is the entrance without a *bona fide* claim of right on land in the possession of another after having been forbidden to so enter. The act is made a crime by statute, G.S. 14-134. The statute carries the heading "Trespass on land after being forbidden. . ."

". . . every unauthorized, and therefore unlawful, entry into the close of another, is a trespass." Dougherty v. Stepp, 18 N.C. 371; Armstrong v. Armstrong, 230 N.C. 201, 52 S.E. 2d 362; Lee v. Stewart, 218 N.C. 287, 10 S.E. 2d 804; Brame v. Clark, 148 N.C. 364.

By the common law an unauthorized entry on the lands of another was redressed by civil action, but where the entry was made by means of force or threats apt to disrupt the peace, the trespass was made a crime in England prior to Sir Walter Raleigh's ill-fated attempt to establish a colony on our shores. Such a disturbance of possession is a statutory crime under our laws. G.S. 14-126. To convict one of the crime of forcible trespass, it is essential for the State to establish an entry with such force as to be "apt to strike terror" to the prosecutor whose possession was disturbed. It is necessary to allege and establish actual possession in the prosecutor. S. v. Simpson, 12 N.C. 504; S. v. McCauless, 31

N.C. 375; S. v. Ray, 32 N.C. 39; S. v. Laney, 87 N.C. 535; S. v. Davenport, 156 N.C. 597, 72 S.E. 7. Whether the right to possession was a good defense at common law was left unsettled in S. v. Ross, 49 N.C. 315.

In 1866 the Legislature made it a crime to invade possession even though the forbidden entry was made without force or threats. Good faith in making the entry is a defense. S. v. Wells, 142 N.C. 590; S. v. Crosset, 81 N.C. 579; S. v. Hause, 71 N.C. 518; S. v. Hanks, 66 N.C. 612. But possession is an essential element of the crime. If the State fails to establish that prosecutor has possession (actual or constructive) no crime has been established. S. v. Baker, 231 N.C. 136, 56 S.E.2d 424; S. v. Faggart, 170 N.C. 737, 86 S.E. 31; S. v. Yellowday, 152 N.C. 793, 67 S.E. 480; S. v. Whitehurst, 70 N.C. 85.

[*Owner Must Be Alleged*]

Where an interference with the possession of property is a crime, it is necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge. If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance. Such has been the holding in forcible trespass, S. v. Sherrill, 81 N.C. 550; in trespass after being forbidden, S. v. Baker, *supra;* in malicious injury to property, S. v. Hicks, 233 N.C. 31, 62 S.E.2d 497; S. v. Mason, 35 N.C. 341; in larceny, S. v. Law, 227 N.C. 103, 40 S.E.2d 699; S. v. Harris, 195 N.C. 306, 141 S.E. 883; S. v. Harbert, 185 N.C. 760, 118 S.E. 6. See also Adams v. State, 119 So. 189 (Miss.), Brown v. State, 85 S.E. 262 (Ga.), 87 C.J.S. 1113, 42 C.J.S. 1054, 27 Am. Jur. 649.

On the appeal defendants could only be tried for the crime for which they were convicted in the Municipal-County Court, viz., disturbing the possession of Gillespie Park Golf Course. The Superior Court could try them for a different crime upon a bill found or waived. S. v. Mills, 242 N.C. 604, 89 S.E.2d 141; S. v. Banks, 241 N.C. 572, 86 S.E.2d 76; S. v. Hall, 240 N.C. 109, 81 S.E.2d 189; S. v. Thomas, 236 N.C. 454, 73 S.E.2d 283; S. v. Mills, 246 N.C. 237.

[*Warrants Amended*]

The Superior Court has broad power to allow amendments to warrants. This power to amend is the power to make accurate and sufficient the statement of the crime asserted or attempted to be asserted. The court has no power to permit a warrant to be amended so as to charge an entirely different crime from the one on which defendant was convicted in the lower court. S. v. McHone, 243 N.C. 231, 90 S.E.2d 536; S. v. Clegg, 214 N.C. 675, 200 S.E. 371; S. v. Goff, 205 N.C. 545, 172 S.E. 407; S. v. Taylor, 118 N.C. 1262.

When the court permitted the warrants to be amended so as to charge a trespass on property of a person (Gillespie Park Golf Club, Inc.) other than property of the person named in the original warrant, it substituted one criminal charge for another criminal charge. This different crime could only be charged by bill found or waived. The defendants have not waived bills.

The record discloses the fatal variance. It is our duty to note it. S. v. Scott, 237 N.C. 432, 75 S.E.2d 154; S. v. Stonestreet, 243 N.C. 28, 89 S.E.2d 734; S. v. Strickland, 243 N.C. 100, 89 S.E.2d 781. Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment. S. v. Strickland, *supra;* S. v. Hicks, 233 N.C. 511, 64 S.E.2d 871; S. v. Sherrill, 82 N.C. 694.

The judgment is Arrested.

[*Concurring Opinion*]

Parker, J., concurring. In considering the amendments to the warrants the difficulty is in determining whether the amendments are as to a matter of form or go to the substance of the charge. I find in Annotations in 7 A.L.R., p. 1526 *et seq.*, and in 68 A.L.R., p. 930 *et seq.*, the statement that "the allowance by the court of an amendment to an indictment as to the name of the person alleged therein to be the owner of the property which is the subject of the crime is generally authorized, as the correction of a defect in form." In support of the text, cases are cited from Iowa, Louisiana, Mississippi, New York, Pennsylvania, Vermont, Canada and England. An examination of a number of the cases cited discloses that the decisions were based on statutes of the various jurisdictions permitting in substance an amendment when a variance

develops between the allegations in an indictment and the testimony as to the ownership of property.

Our statute G. S. 15-148—Manner of alleging joint ownership of property—does not permit the amendments allowed in the instant case. Nor do I know of any statute of ours that does so.

[*Difficulties Caused*]

Warrants are, in most instances, drafted by laymen who are not learned in the technicalities of the law, and are not familiar with the necessity of stating in the warrant the correct name of the owner of property. The essence of the offense here is a trespass upon land after being forbidden. G. S. 14-134. The correct name of the lessee of the golf course was not stated in the original warrants. A study of the Record and defendants' brief discloses that the amendment to the warrants so as to allege the correct name of the lessee of the golf course did not affect the defense, or take the defendants at a disadvantage in any respect, as shown by the fact that their brief does not contend the allowance of the amendments to the original warrants was error. Yet, because of the defect in the name of the lessee, and by reason of the fact that we have no statute to permit an amendment in such a case, the judgment is arrested. The time of the trial has been wasted, and if the State desires to proceed further, it must start anew with new warrants.

One test to determine whether the change made was material is whether a verdict of conviction or acquittal on the warrant as drawn would be a bar to a warrant in the form in which it stood after the amendment. Com. v. Snow, 269 Mass. 598, 169 N.E. 542, 68 A. L. R. 920. It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments. It follows from these considerations that the change made in the warrants was one of substance and not of form.

In my opinion, the General Assembly, in its wisdom, should consider the advisability of enacting a statute that warrants issued by Justices of the Peace, or Municipal or County Criminal Courts, can be amended on or before the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property, if the court should be of opinion that the amendment will not prejudice the defendant in his defense. Various states have done so, as appears in the cases cited in the A. L. R. Annotations referred to above.

PUBLIC ACCOMMODATIONS
Restaurants, Taverns—Illinois

CITY OF CHICAGO v. John CORNEY, Jr., Katherine Fields, John R. Forbes, Fred Fields, Jeanne K. Wesson and Dale Drews.

Illinois Appellate Court, First District, First Division, April 29, 1957, 142 N.E.2d 160.

SUMMARY: Six defendants, members of an interracial group, were arrested and brought before a Chicago municipal court on a charge of disorderly conduct. The charge resulted from the efforts of the group to receive service at a tavern. There was conflicting evidence as to whether the group was disorderly. The defendants testified that they went to the tavern in order to conduct a test as to whether Negroes would be served and that they were not disorderly. Other testimony was to the effect that at least two of the defendants created a loud disturbance. All six were convicted and sentenced to fines. On appeal the Illinois Appellate Court sustained the conviction as to two of the defendants and reversed as to the other four. The court stated that the right to the use of public accommodations without regard to race or color, derived from the Illinois Civil Rights Statute, was conditioned upon their use in an orderly manner.

NIEMEYER, Presiding Justice.

Defendants appeal from separate judgments for $100 and costs entered against each of them on a finding of guilty of disorderly conduct, in violation of Chapter 193, Section 1, sub-section 1 of the Municipal Code of Chicago.

Defendants are a mixed racial group—four Caucasians and two Negroes. All of the defendants except Jeanne Wesson were members of the Chicago Committee of Racial Equality, commonly referred to as CORE, an organization dedicated to the principle of achieving racial justice through the use of nonviolent methods. On May 11, 1956, about 10:30 p.m., defendants and four other persons went to Jennie's Restaurant at 658 East 79th Street, Chicago, a licensed public tavern and restaurant, for supper; they were refused service; they remained on the premises and stated their intention to stay until they were served or the place was closed; the police were called by the manager and defendants were arrested; they were tried on a complaint sworn to by Michael Berg, a customer at the bar, charging the making or aiding in making an improper noise, riot, disturbance, breach of peace, or diversion tending to a breach of the peace.

[*Prior Denial of Service*]

Two Negro members of the group—one a defendant—had previously been denied service in the restaurant. Jeanne Wesson had previously visited the premises with persons other than the defendants and talked with the bartender, who was also the manager, about service to people without reference to race or color. They were unable to see Jennie. The bartender testified that he had said he would not serve Negroes in the tavern. At a meeting of the group in the home of one of its members on May 11th they decided to go to the restaurant for food. Each defendant testified as to what was to be done to procure service. Defendant Wesson, married and the mother of two children, said that their purpose, if not served, was to sit there and wait until somebody came to talk to them, and maybe they could persuade the management by words and nonviolent action to serve the members of the group. She defined nonviolent action as "action taken to achieve a change with love, without rancor, without violence of any kind, physical or any other type of violence, words, mental, emotional, and so on." Defendant Fields, a shipping clerk and husband of defendant Katherine Fields, testified that they did not intend to use any violent means or any loud or abusive language in order to be served. Defendant Corney, an artist, said that they intended to get service by sitting down and waiting until served; they had no intention to use any violent methods to force people to serve them. Defendant Forbes, a medical technician, testified it was "not our intention to obtain service regardless of the means"; their intention "was to remain seated until such time as we would be served or the place would close," and "it was clearly understood that this was the method to be used." Defendant Katherine Fields said they went to the tavern to be served and to wait to be served because Jennie's had a public license. Defendant Drews, a 20-year-old student and employee of a university, said that the sole purpose of going to Jennie's was a "desire to be served regardless of the racial composition of the group." There is no other evidence as to the intent or plan of the defendants, and the court correctly found that defendants "definitely planned to enter Jennie's place and insist in a nonviolent manner to obtain service of food."

[*Evidence in Conflict*]

There is a direct conflict in the evidence as to the means and manner of the entry of the group into the restaurant and of the conduct of the respective defendants after entry, particularly with reference to defendants Katherine Fields and Drews. Plaintiff's evidence is to the effect that ingress and egress from the premises at the main entrance was controlled by a buzzer operated by the bartender, who could see persons, wishing to enter, through the glass of the inner door of the vestibule; that the group, including defendants, entered when he pressed the buzzer to permit the exit of customers; that they were noisy, grabbed seats at tables marked reserved, threw themselves on the floor and boisterously demanded service and refused to leave after being told that the kitchen, or the place, was being closed and they would not be served. When required to detail the actions of each defendant, the witnesses for plaintiff, except Berg, limited their testimony to the conduct of Katherine Fields and Drews. They testified that Katherine Fields was loud and boisterous from her entry to the premises until placed under arrest, shouting her demand for service and

creating a disturbance; that Drews laid on the floor several times, obstructing the aisles and interfering with the orderly passage of patrons and employees in the premises. Berg testified that Fred Fields and Corney started hollering "We want service." Testimony on behalf of defendants is to the effect that the entry into the premises was peaceful and quiet, through an unlocked door; that they sat at tables not marked reserved and asked to be served with food, without noise or disturbance; that the tables at which they were sitting were forcibly removed and they were told they would not be served, and an effort was made to remove them from the premises.

[*Opinion of Trial Court*]

In finding defendants guilty the court said:

"* * * evidently they (defendants) had some skepticism in their minds about being served here; nevertheless, they did go to Jennie's place and whether or not the tables were marked reserved and whether or not they were told the kitchen was closed or whether or not they were refused service in an outright manner without any other statement being made, is immaterial in this case. *The important thing as I see it,* * * * they were definitely told either that the kitchen was closed or that they would not be served, or that the tables were reserved, and *they knew shortly after they entered that under no circumstances would they receive any food on that particular evening. Yet, notwithstanding that fact* * * * *they continued to remain there, all times knowing full well that they would not be served at that particular time. Their action in so doing, together with the testimony as brought out by the City's witnesses that there was a lot of noise, that they were tumultuous,* and that Joffree Stewart (not a defendant here) hit the floor as soon as he got in this restaurant; that he was joined there shortly by one of the other defendants; that one of the defendants in particular continued shouting for the entire time she was there, *and that this was a concerted plan of action of all the defendants that remained there,* and their action was such that might very well have caused other individuals in the place to become violent against these particular individuals who are now on trial. Their action was not such that one would say that they were in the peace of the people." (Emphasis added.)

[*Civil Rights Statute*]

According to this statement the judgment was based on a finding that defendants remained in the restaurant, "knowing full well that they would not be served," coupled with noise and tumultuous conduct—the concerted plan of all defendants. The principal question is the right, if any, of persons conducting themselves in a peaceful and orderly manner, to remain in the tavern and restaurant after service has been denied them on account of race or color, or because members of the group are Negroes. The statute of the state, generally referred to as Civil Rights statute, in so far as it is pertinent here (Ill.Rev.Stats. 1955, chap. 38, par. 125) provides in section 1 that

"All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, * * * taverns, * * * cafes, * * * and all other places of public accommodations and amusement, subject only to the conditions and limitations established by laws and applicable alike to all citizens; * * *."

Section 2 provides that any person who shall violate the provisions of section 1

"by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay a sum not less than twenty-five ($25) dollars nor more than five hundred ($500) dollars to the person aggrieved thereby, * * * and shall also, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not to exceed five hundred dollars ($500), or shall be imprisoned not more than one year, or both."

[*Purpose of Statute*]

The purpose of the statute, as stated in Pickett v. Kuchan, 323 Ill. 138, 153 N.E. 667, 668, 49 A.L.R. 499, "is to regulate, for the promotion of the public good, certain businesses in which the public have an interest, and it is therefore remedial." As applied to taverns and restaurants, such as Jennie's, the statute imposes obligations and duties and gives to persons wishing to patronize such places rights unknown to the common law. Horn v. Illinois Cent. R. Co., 327 Ill.App. 498, 64 N.E.2d 574. Under the statute, the accommodations, advantages, facilities and privileges of taverns and restaurants, like those of inns and common carriers of passengers or freight under the common law, must be made available on equal terms and conditions to all persons without distinction as to race or color. Persons seeking such accommodations, etc., cannot be excluded from the premises so long as they conduct themselves in a peaceable and orderly manner. The rule governing common carriers is stated in Old Colony Railroad Co. v. Tripp, 1887, 147 Mass. 35, 17 N.E. 89. In that case the railroad company brought a tort action against defendant for obstructing the station grounds of plaintiff as Brockton; defendant, the owner of a job wagon engaged in carrying baggage and merchandise, had been going to plaintiff's station to wait for trains and solicit business from passengers on plaintiff's trains. The railroad entered into a contract with Porter and Sons to handle that business, and posted a notice in the station excluding other job wagon owners from entering the station to solicit business. The trial court directed a verdict for plaintiff. On appeal the judgment was affirmed, and the court, in defining the rights of plaintiff in its station, held that passengers taking and leaving the trains at the station had a right to access and use of the station buildings and grounds superior to the rights of the plaintiff to exclusive occupancy. It said, 147 Mass. at pages 36-37, 17 N.E. at page 92:

> "The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. * * * It provided its depot for the use of persons who were transported on its cars to or from the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is held. * * * The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, *had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy.* All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it." (Emphasis added.)

[*Acts of Defendants*]

The defendants here, so long as they conducted themselves in an orderly manner, had a right superior to the rights of the owners and employees of the tavern and restaurant business, to enter the premises and wait for service, so long as the place was open and occupied by others enjoying the accommodations of the business being conducted there. The owners and employees could not, by violating the law and refusing service on account of the race or color of some members of the group, deprive them of the right. Excepting the defendants Katherine Fields and Drews, the record does not support the finding of noisy or tumultuous conduct. No witness for plaintiff mentions the defendant Forbes. He was merely present. Defendant Wesson passed out three or four pamphlets published by CORE to patrons at the bar, and conversed with several of them—so far as the record shows, in conversational tone and without objection from the patrons. Although Berg testified that Fred Fields and Corney shouted "We want service," the bartender merely says that Fields was standing and Corney was sitting during the occurrence. Fields and Corney deny any disorderly or boisterous conduct. The statement of the court that the action of Drew in lying on the floor, and of Katherine Fields in shouting continuously during the time she was in the restaurant, was "a concerted plan of action of all the defendants," is in direct conflict with the finding, heretofore stated, that the defendants "definitely planned to enter Jennie's place and insist in a nonviolent manner to obtain service

of food." It is also contrary to the undisputed testimony of the defendants, hereinabove stated.

The finding of the court as to defendants Katherine Fields and Drews is not against the manifest weight of the evidence. Their conduct cannot be justified by any right to service in the restaurant, or excused by disregard of that right by the manager. The judgment as to these defendants is affirmed. The judgment against the remaining defendants is reversed.

Affirmed in part, reversed in part.

BURKE and FRIEND, JJ., concur.

TRIAL PROCEDURE

Grand Juries—Louisiana

STATE of Louisiana v. Freddie EUBANKS.

Supreme Court of Louisiana, February 25, 1957, 94 So.2d 262.

SUMMARY: The defendant, a Negro, was convicted of murder in a Louisiana state court. He appealed to the Louisiana Supreme Court on the ground, among others, that the trial court had erred in refusing to quash the indictment on which the defendant was tried. The motion to quash had been made on the basis that there had been a systematic exclusion of Negroes from the grand jury which indicted and that this constituted a deprivation of rights secured to the defendant by the Fourteenth Amendment to the Constitution. The Louisiana Supreme Court found that the evidence did not support the contention of systematic exclusion. [The United States Supreme Court, on June 24, 1957, granted a stay of execution pending final disposition of a petition for writ of certiorari, see p. 777, *supra.*] A portion of the court's opinion, by Justice MOISE, follows:

The defendant was tried, convicted and sentenced to death for the murder of Mrs. Mable Clarkson, a white woman, on May 24, 1954. He appeals to this Court from the conviction and sentence.

Thirty-two Bills of Exceptions were perfected during the trial, but approximately one-half this number are presented for consideration on this appeal.

Bills of Exceptions One through Six (consolidated on this appeal) were taken to the refusal of the trial court to quash the indictment returned against the accused, on the ground that the Grand Jury which returned the true bill of indictment against the accused was unconstitutionally drawn by Honorable Frank T. Echezabal, Judge of Section "D" of the Criminal District Court for the Parish of Orleans. It is alleged that Negroes were unlawfully, systematically and unconstitutionally excluded from the all white Grand Jury which indicted the defendant, a Negro, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[*Method of Selecting Jury*]

The method of selecting the Grand Jury in Louisiana is set forth in LSA-R.S. 15:191, 15:194 and 15:196. They provide for the appointment of a Jury Commission, composed of three members, by the Governor of the State. This Commission selects a list of names, not less than seven hundred and fifty, from all sources available—telephone directory, recommendations of corporations, city directory, recommendations of business executives—and places them in a general wheel. The record discloses that a sincere effort is made to include the names of Negroes in this list. Twice a year the Commission draws seventy-five names from the wheel and sends them to the Judge of the Criminal District Court whose turn it is to select a Grand Jury. There are eight divisions of the Criminal District Court for the Parish of Orleans, and each Judge has his turn in rotation to select a Grand Jury. The seventy-five names are indiscriminately drawn from the wheel as are a larger number of names for the Petit Juries. Each

name bears information as to the person's occupation and address, but no mention is made as to race or color. In the matter herein involved, the list of seventy-five names contained the names of six Negroes.

The Judge selecting the Grand Jury is empowered to use his own discretion in selecting the twelve members. From the evidence of record, we find that the majority of the Judges interviewed a large number of the seventy-five persons listed before making a selection of a Grand Jury. Judge Frank T. Echezabal, who selected this contested Grand Jury, testified that he had been a Judge of the Criminal District Court for the Parish of Orleans since 1921 and stated:

> "* * * I select those whom I believe are best qualified to serve on the grand jury and when I select them I don't know whether they are negroes or persons of the Caucasian race. I make no distinction sir. I would not exclude from my grand jury merely on account of race. I would not and I have never done it."

With respect to qualifications, Judge Echezabal said he considered—

> "Good character, citizenship, availability and education to serve as grand jurors, because there are some men although they have a very good educational background, on account of temperament are not qualified to act either as petty or grand jurors."

The record undeniably discloses that in selecting the instant Grand Jury composed of all white persons, which served six months and indicted many persons other than the defendant, white and colored, Judge Echezabal did not abuse his discretion when he chose those he thought most qualified to serve and did not include any of the six Negroes which had been presented to him. State v. Dorsey, 207 La. 928, 22 So.2d. 273.

[*No Systematic Exclusion*]

The record discloses no systematic exclusion of Negroes from the Grand Jury. The only reason Negroes were not selected to serve was that the Judge selecting the Grand Jury thought that the white persons selected were better qualified.

In the recent case of Reece v. State of Georgia, 349 U.S. 944, 75 S.Ct. 877, 99 L.Ed. 1270; 350 U.S. 85, 76 S.Ct. 167, 169, 100 L.Ed. 77; 211 Ga. 339, 85 S.E.2d 773; 350 U.S. 943, 76 S.Ct. 297, 100 L.Ed. 822, the United States Supreme Court laid the following predicate:

> "This Court over the past 50 years has adhered to the view that valid grand jury selection is a constitutionally protected right. The indictment of a defendant by a grand-jury from which members of his race have been systematically excluded is a denial of his right to equal protection of the laws. Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76; Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Rogers v. State of Alabama, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417; Carter v. State of Texas, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839. Where no opportunity to challenge the grand jury selection has been afforded a defendant, his right may be asserted by a plea in abatement or a motion to quash before arraignment, United States v. Gale, 109 U.S. 65, 72, 3 S.Ct. 1, 6, 27 L.Ed. 857. Of course, if such a motion is controverted it must be supported by evidence, Patton v. State of Mississippi, supra; Martin v. State of Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497."

We believe that defendant's motion to quash has been sufficiently controverted by evidence which proves his statements to be false. The pattern of proof was established in the case of Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074. There the United States Supreme Court held that the Court could not accept the mere statement of officials as to the performance of their duties but must actually examine the records to determine whether there had been a deliberate exclusion of Negroes from jury service.

[*Efforts to Secure Negro Jurors*]

The record in this case shows that the Negro population in the Parish of Orleans is approximately 30%. The evidence also shows that in selecting the 750 names to be placed in the general wheel, the Jury Commissioners made a deliberate attempt to include the names of Negroes, without proportionately limiting their number. Walter E. Douglas, Jr., Jury Commissioner from 1942 through 1948, stated that he

attempted to secure names through the Housing Authority and subpoenaed many Negroes. His successors, Dudley Desmare and V. G. Warner, followed the same practice. The facts show that the names of many Negroes have been in the general wheel at all times.

The case of State v. Dorsey, 207 La. 928, 22 So.2d 273, 281,—relying on the case of Commonwealth of Virginia v. Rives, 100 U.S. 313, 322, 25 L.Ed. 667—held that a mixed jury in a particular case is not essential to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. We stated:

> "• • • defendant complains that there was no Negro on the grand jury that found the indictment, and alleges that there has not been a Negro on a grand jury in the Parish of Orleans for a period of 25 years. Under the facts in this case, this complaint simply means that defendant is claiming the right to have a jury composed in part of members of his own race. This we do not understand to be the law. So to hold under the facts in this case would be tantamount to saying that it was the mandatory duty of the district judge to place on the grand jury which found the indictment the member of the colored race who was on the jury panel."

Bill of Exceptions No. Two, incorporated herein, was taken to the refusal of the trial judge to permit the Clerk of the United States District Court to testify as to the method of selecting the Federal Grand Jury.

We believe that the trial judge was correct, as only the method of selecting the Orleans Parish Grand Jury, a Louisiana State Grand Jury, was involved.

Bill of Exceptions No. Three was to the same effect.

[*Testimony of Judge*]

Bill of Exceptions No. Four was taken to the refusal of the trial judge to permit Honorable William J. O'Hara, a Judge of the Criminal District Court for the Parish of Orleans, to answer the following question:

> "Do you feel, (it is assumed by your answer to the last question), but I would like to ask you whether you feel the selection of the Grand Jury since 1932 and up to the last Grand Jury was an improper method?"

The trial judge was correct. The instant Grand Jury was under consideration, and the alleged denial of equal protection of the laws depended upon the facts of this particular case. State v. Green, 221 La. 713, 60 So.2d. 208.

Bill of Exceptions No. Five is to the same effect.

Bill of Exceptions No. Six was taken to the refusal of the trial judge to testify as to his method of selecting a grand jury. He was correct, because he could not act both as a judge and as a witness.

Bills of Exceptions Nos. One through Six have been adjudged on the facts of the case, and, as stated above, we do not find that the judge abused his discretion in selecting the Grand Jury. Therefore, the bills are without merit.

• • •

TRIAL PROCEDURE
Grand Juries—Louisiana

STATE of Louisiana v. Robert PALMER

Supreme Court of Louisiana, February 25, 1957, 94 So.2d 439.

SUMMARY: The defendant, a Negro, was convicted by a state court in Louisiana of murder. He appealed, alleging as error the refusal of the trial court to quash the indictment. The motion to quash had been made on the basis of a systematic exclusion of Negroes from the grand jury which indicted. The motion also alleged that there were no Negroes on the grand jury, or that if there were, they were placed on the grand jury as a result of a systematic or purposeful inclusion of a token number. It was also contended that two members of the grand jury were "persons of color" and not "Negroes" of the same class as the defendant.

The Louisiana Supreme Court found that there had been neither a systematic exclusion of Negroes from the grand jury nor a token inclusion of some Negroes. The court also found no merit in the contention that "persons of color" are not of the same class as "Negroes." The conviction was, however, reversed on other grounds. Part of the court's opinion, by Justice HAWTHORNE, follows:

This is an appeal by Robert Palmer, a Negro, who was charged with the murder of his wife, tried, convicted, and sentenced to death.

Appellant first claims that the trial judge erred in overruling his various motions to quash the indictment. These motions are predicated upon the contentions, first, that there has existed in Orleans Parish since time immemorial a systematic exclusion of Negroes from grand juries, in contravention of constitutional guarantees; and, second, that there were no Negroes on the grand jury which indicted appellant, but that if there were, they were placed on the jury in a systematic or purposeful inclusion of a token number, which is as constitutionally objectionable as exclusion.

[*Constitutional Requirements*]

In this case there is no dispute as to the law as announced by the Supreme Court of the United States and this court, to the effect that it is a denial of the equal protection of the laws to try a defendent of a particular race or color under an indictment found by a grand jury from which all persons of his race or color have, solely because of that race or color, been systematically excluded; likewise, that a systematic or purposeful inclusion of a token number of persons of a particular race is as constitutionally objectionable as exclusion.

The manner of selecting juries, both grand and petit, in the Parish of Orleans is prescribed by the Code of Criminal Procedure, Articles 191 et seq. Under this law a jury commission composed of four persons shall select at large and impartially from the citizens of the parish having the qualifications requisite to register as voters 750 persons possessing the qualifications of jurors. The names of the persons so selected shall be placed in a jury wheel from which at six-month intervals the commissioners shall draw not less than 75 names which shall constitute the grand jury list of venire.

This grand jury list is submitted to the judge of the Criminal District Court for the Parish of Orleans whose turn it shall happen then to be to empanel the incoming grand jury, and from the names thus submitted the judge shall select 12 persons who shall constitute the grand jury for the Parish of Orleans for the ensuing grand jury term.

[*Juror Qualifications*]

The jury commission in selecting the general venire of 750 persons must select persons possessing the qualifications to serve as grand jurors, as prescribed in Article 172 of the Code of Criminal Procedure, that is: They must be citizens of this state, not less than 21 years of age, bona fide residents of the parish in which the court is being held for one year preceding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, and in addition must be persons of well known good character and standing in the community.

It is conceded in the instant case, and the record so shows, that members of the Negro race constitute a large segment of the population of the City of New Orleans, and that a number of them possess the necessary qualifications for jury service. The jury commission for a number of years has made a sincere effort to secure the names of qualified Negroes to place in the jury wheel for service both as grand and as petit jurors. In its efforts to find qualified Negroes for jury duty the jury commission has consulted Negro leaders and had them submit names, and has consulted the city directory, the registration rolls, lists from Negro housing projects, and other means at its disposal. In fact, the record shows that the jury commission has made a special effort to see that Negroes were included in the jury list.[1] As a result of these conscientious efforts on the part of the members of the jury commission, the names of varying numbers of Negroes have for several years been included in the jury wheel.

---

[1] The efforts of the jury commission to obtain qualified jurors for the general venire list are fully set out in the opinion of this court rendered this day in the case of State v. Eubanks, 232 La. ——, 94 So.2d 262.

[*No Discrimination Shown*]

The record does not give any support to appellant's contention that the jury commission in selecting the general venire has systematically excluded Negroes because of race or color, or that it has as a subterfuge systematically limited the number of Negroes whose names are contained in the general venire list.

In the instant case, in the grand jury list of 100 names submitted to the district judge there were the names of 10 Negroes, and on the jury of 12 selected by the judge to compose the grand jury which returned the indictment in the instant case two Negroes were selected and served on the grand jury.

[*Classes of Negroes*]

Under our law, in the Parish of Orleans the judge selects the entire jury and is charged with the duty of choosing those who in his judgment are the best qualified to serve as grand jurors, and there is no showing or proof that the judge deliberately and intentionally limited to two the number of Negroes so chosen. In fact, the judge in the instant case interviewed a number of Negroes on the grand jury list, and there is nothing in the record to show that he would not have selected all the Negroes on the list had they possessed superior qualifications or qualifications on a par with those of the other 10 persons whom he chose. There is a presumption that the judge in choosing the instant jury did his duty according to law. It is well established that in cases such as this the burden is upon the defendant to establish the discrimination, and there is no evidence which would even tend to show that the jury commission and the judge practiced either systematic discrimination against Negroes or systematic token inclusion of them.

Appellant also argues that there were no Negroes on the grand jury which found the indictment in this case within the definition of the word "Negro". In other words, he is attempting to draw a distinction between a person of color and a Negro. The two grand jurors to whom we have referred as Negroes gave us the benefit of their testimony on the trial of this motion to quash. Both testified that they had always considered themselves Negroes, and that others always had so regarded them. Their birth certificates showed their race as colored, and so far as they knew, all of their ancestors considered themselves Negroes.

Appellant would have us say that discrimination exists because appellant is a Negro but these two jurors are members of the colored race and therefore are not of the same race and class as the accused. This novel effort to show discrimination is completely unrealistic. Appellant in effect is arguing that there exist two or more classes of Negroes, and that a Negro of any one of the so-called classes may allege that his class has been discriminated against in the matter of drawing juries if members of his particular class are excluded from the venire by reason of being members of that particular class of Negroes, even though members of other classes of Negroes have been included in the venire.

The proof here is sufficient that the two jurors whom appellant classes as persons of color were in fact members of the Negro race, the same race and class as the accused.

* * *

TRIAL PROCEDURE
Grand Juries—Texas

Marshall LAMKIN v. The STATE of Texas

Court of Criminal Appeals of Texas, February 20, 1957, 301 S.W.2d 922.

SUMMARY: The appellant, a Negro, was convicted of murder in a Texas state court. He appealed on the ground, among others, that the trial court had erred in overruling his motion to quash the indictment. The motion had been based on an allegation of racial discrimination in the selection of the jury commission and the grand jury which indicted him. The Court of Criminal Appeals found that there was no evidence of a systematic exclusion of

Negroes from the jury commission nor from the grand jury and that one Negro had served on the grand jury which indicted the appellant. It therefore rejected that ground of appeal. Part of the court's opinion, by DICE, Commissioner, follows:

* * *

By Bill of Exception No. 2 appellant complains of the action of the court in overruling his motion to quash the indictment on the grounds of racial discrimination in the selection of the jury commission and the grand jury which returned and presented the indictment against him.

Appellant alleged in the motion that the District Judge of Caldwell County and his predecessors had systematically appointed only persons of the white race to serve on the grand jury commissions and that the jury commissions so appointed had systematically and arbitrarily discriminated against the Negro race, of which he was a member, by excluding Negroes from grand jury service and where not excluded by limiting the number to one.

It was further alleged that the grand jury commission practiced discrimination in selecting the grand jury which returned the indictment against appellant by systematically and intentionally limiting the members of the Negro race who served on the grand jury to one.

The court, in approving the bill, qualified the same by certifying that the evidence presented by appellant on the hearing of the motion wholly failed to support his contention of discrimination but, on the contrary, positively shows that there was no discrimination against the Negro race.

[*Evidence Presented*]

The evidence shows that one member of the grand jury which presented the indictment against the appellant was a Negro, and that Negroes had served on other prior grand juries selected in the county. It was further shown that jury commissions appointed by the District Judge and his predecessors had been instructed not to discriminate against any person due to race, color or creed. The three jury commissioners who selected the grand jury panel from which the grand jury was selected that presented the indictment against appellant testified on the hearing. Commissioner Moore testified that she picked a Negro from Lockhart but did not know whether he served on the grand jury, and that she picked people whom she thought would be responsible and qualified for the job. Mrs. Harper, another commissioner, testified that the judge instructed the commission not to discriminate due to color, race or creed; that she did not discriminate and tried to pick a grand jury whom she thought was best qualified. Commissioner Rabon testified that in selecting those on the grand jury panel he did not discriminate against anyone because of race or color, but picked names by qualification and not by race.

No evidence was offered showing the number of Negro citizens of Caldwell County who were qualified for grand jury service.

We think the evidence presented supports the trial judge's qualification and fails to support appellant's contention.

The mere fact that no Negro was appointed on the jury commission is insufficient to show racial discrimination. Morris v. State, 158 Tex.Cr.R. 516, 251 S.W.2d 731, certiorari denied 345 U.S. 951, 73 S.Ct. 863, 97 L.Ed. 1374, and Addison v. State, 160 Tex.Cr.R. 1, 271 S.W.2d 947. The evidence fails to show a systematic discrimination against the Negro race by the jury commission of Caldwell County in selecting grand jurors in the county, including the grand jury which returned the indictment against appellant. There is no contention made that discrimination invaded the selection of the jury which tried the accused.

* * *

We find the evidence sufficient to support the jury's verdict and no reversible error appears in the record.

The judgment is affirmed.

Opinion approved by the Court.

* * *

TRIAL PROCEDURE
Petit Juries—Louisiana

STATE of Louisiana v. Donald Rufus EDWARDS.

Supreme Court of Louisiana, April 1, 1957, 94 So.2d 674.

SUMMARY: The defendant, a Negro, was tried and convicted of rape in a Louisiana state court. On appeal he alleged that he had been denied his constitutional right to a trial by a jury of his peers because a member of the jury had been allowed to serve after he had stated on voir dire examination that, although he was not a member of the Louisiana White Citizens' Council, he believed in "white supremacy." The trial court had found that the juror was not prejudiced. The Louisiana Supreme Court sustained the trial court's overruling of a challenge for cause of the juror. A part of the court's opinion, by Justice ad hoc HAMLIN, follows:

* * *

Bill of Exceptions No. Three was reserved to the ruling of the trial court on the challenge of Juror John R. Murphy.

Mr. Murphy, who had been in the jury box during the questioning of a number of persons as to whether they belonged to the Louisiana White Citizens' Council, stated on voir dire that he did not belong to that organization, but that he believed in white supremacy.

It is the contention of counsel for the defendant that Mr. Murphy was prejudiced against the colored race and could not relieve himself of the prejudice. They argue that the defendant was denied the constitutional guarantee of a trial by his peers.

Since the testimony taken in connection with this bill was not transcribed, the same ruling applies as in Bill of Exceptions No. Two. The following per curiam of the trial judge, which must be accepted as true, ably explains the statement of this juror:

"* * * The juror, Mr. Murphy, had been in the box in the courtroom while these questions and answers were being given and received, and the last such case was just a few minutes before Mr. Murphy's examination on voir dire was begun by defense counsel. Mr. Murphy was asked if he belonged to that organization and Mr. Murphy replied that he did not, but that he believed in white supremacy. This was a voluntary statement on Mr. Murphy's part and was obviously given by Mr. Murphy to be frank. It was at this point that defense counsel asked Mr. Murphy what he thought white supremacy meant and it was in answer to that question by defense counsel that Mr. Murphy stated he did not believe the negro was his equal. He immediately explained by saying that he was referring solely to the field of social relationships. It is stated in the bill of exception that Mr. Murphy in giving his answer showed his prejudice by using the word 'nigger.' The Court was listening very closely to this examination, and the Court did not understand Mr. Murphy to say 'nigger,' but understood him to use the word 'negro,' and the Court did not discern any implication of prejudice in the juror's remark. It was also stated in the bill of exception that Mr. Murphy stated that he could not relieve himself of said prejudice. The juror made no such statement. Indeed, as will be shown by the Note of Evidence attached to this bill of exception, the Court dictated to the Court reporter at the time this incident occurred the explanation that Mr. Murphy gave of his statement. As indicated in the Court's remarks at the time, Mr. Murphy answered further questions by counsel for defendant that it was his personal opinion that a member of the colored race was his complete equal under and before the law and entitled to all of the rights, privileges and immunities before the law to which any other citizen was entitled. He further answered that he had no prejudice whatever against a member of the colored race and that he could and would try this case, if selected as a juror, solely on the law and the evidence. He further stated that the fact that the defendant in this case was a colored man and that the victim was a white woman would not interfere with his im-

partial consideration of the law and the evidence.

"Believing this to be true, the Court is of the opinion that Mr. Murphy was a qualified juror and the challenge for cause was therefore overruled."

We, therefore, find Bill of Exceptions No. Three to be without merit.

* * *

ELECTIONS
Registration—North Carolina

Louise LASSITER et al. v. Helen H. TAYLOR, Registrar Seaboard Precinct

United States District Court, Eastern District, North Carolina, June 10, 1957, No. 1019.

SUMMARY: A Negro woman in Northampton County, North Carolina, brought a class action in federal district court against a registrar of voters. The action sought declaratory and injunctive relief from the refusal of the registrar to permit the registration of the plaintiff because of the application of a literacy test required by North Carolina statute. While the action was pending the statute was amended so as to remove a "grandfather clause" and a prior requirement that literacy be established to the "satisfaction of the registrar" and to provide for administrative and court review of the acts of a registrar (2 Race Rel. L. Rep. 706). The plaintiff contended that the new statutory requirement of a literacy test was unconstitutional because of the existence of a "grandfather clause" in the North Carolina Constitution. A three-judge district court was convened. The court issued an order staying proceedings in the case pending the exhaustion of state administrative and judicial remedies.

Before PARKER, Circuit Judge, and GILLIAM and WARLICK, District Judges.

PER CURIAM.

This is an action begun as a class action by a Negro woman resident in Northampton County, North Carolina, against the Registrar of the voting precinct in which she resides, to have the Court declare unconstitutional and void the literacy test for voters prescribed by Section 4 of Article VI of the Constitution of North Carolina and Sections 163-28 of the General Statutes of North Carolina as that section appeared at the time of the institution of the action, and for an injunction restraining the Registrar from denying registration to plaintiff on the ground of failure to comply with the literacy test. After the action was instituted, the General Assembly of North Carolina enacted a statute, the effect of which was to repeal the old statute containing the so called "grandfather clause" and requiring that ability to read and write be shown to the satisfaction of the registrar and to substitute therefor a statute prescribing a literacy test without any "grandfather" clause and without any reference to "satisfaction of the registrar", and providing an appeal from the action of the registrar from denial of registration to the county board of elections and thence to the Superior Court of the County. Act of March 29, 1957. This statute was attacked as unconstitutional in a reply filed by plaintiff. Two other Negro women who had been denied registration by the same registrar were allowed to intervene and make themselves parties to the action. A court of three judges was constituted as required by statute, a hearing was had at which the parties were allowed to introduce all the evidence which they offered, were heard at length on their contentions and were allowed additional time for the filing of briefs.

At the hearing, it was shown, without contradiction, that the literacy test was applied by the registrar to white persons and Negroes alike without discrimination; and the cross examination of the three Negro women who were denied registration by the Registrar amply established adequate basis for the denial if the literacy test is valid. The contention of counsel for plaintiffs on the record made at the hearing, as we understand it, is not that the literacy test was discriminatingly applied against their clients, but that it is inherently void.

No queston remains in the case with respect

to Section 163-28 of the General Statutes as that section read at the time of the institution of this action. Neither injunction nor declaratory relief with regard thereto is appropriate, as that section with its "grandfather clause" and with its requirement that ability to read and write be shown to the satisfaction of the registrar has been superseded by the Act of March 29, 1957, which contains neither of these provisions and which provides administrative remedies for those claiming that they have been improperly denied the right to register.*

The only question in the case is whether the Act of March 29, 1957, should be declared void and its enforcement against plaintiffs enjoined by the court on the ground that it is violative of their rights under the Federal Constitution. We need not consider whether it is violative of provisions of the State Constitution, as argued by plaintiffs; for this does not present a federal question. And no question is presented as to its being discriminatorily applied to plaintiffs, since plaintiffs have not applied for registration under its provisions and have not exhausted the administrative remedies which it provides. Plaintiffs argue, however, that it is unconstitutional because they say it was enacted pursuant to the provisions of Article VI Section 4 of the State Constitution and is vitiated by the discriminatory provisions contained in that section.[1]

There can be no question but that Article VI Section 4 of the State Constitution was, when enacted, void as violative of the provisions of the 14th and 15 Amendments to the Constitution of the United States. Guinn and Beal v. United States 238 U.S. 347; Myers v. Anderson 238 U.S. 368. It is argued, however, that the "grandfather clause" of that section has no application to voters who reached voting age

* The Act of March 29, 1957 is as follows:

"Sec. 1. Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section.

"Sec. 2. Any person who is denied registration for any reason may appeal the decision of the registrar to the county board of elections of the county in which the precinct is located. Notice of appeal shall be filed with the registrar who denied registration, on the day of denial or by 5:00 p.m. on the day following the day of denial. The notice of appeal shall be in writing, signed by the appealing party, and shall set forth the name, age and address of the appealing party, and shall state the reasons for appeal.

"Sec. 3. Every registrar receiving a notice of appeal shall promptly file such notice with the county board of elections, and every person appealing to the county board of elections shall be entitled to a prompt and fair hearing on the question of such person's right and qualifications to register as a voter. A majority of the members of the board shall be the decision of the board. All cases on appeal to a county board of elections shall be heard de novo, and the board is authorized to subpoena witnesses and to compel their attendance and testimony under oath, and is further authorized to subpoena papers, and documents relevant to any matter pending before the board. If at the hearing the board shall find that the person appealing from the decision of the registrar is able to read and write any section of the Constitution of North Carolina in the English language and if the board further finds that such person meets all other requirements of law for registration as a voter in the precinct to which application was made, the board shall enter an order directing that such person be registered as a voter in the precinct from which the appeal was taken. The county board of elections shall not be authorized to order registration in any precinct other than the one from which an appeal has been taken. Each appealing party shall be notified of the board's decision in his case not later than ten (10) days after the hearing before the board.

"Sec. 4. Any person aggrieved by a final order of a county board of elections may at any time within ten (10) days from the date of such order appeal therefrom to the Superior Court of the county in which the board is located. Upon such appeal, the appealing party shall be the plaintiff and the county board of elections shall be the defendent, and the matter shall be heard de novo in the superior court in the same manner as other civil actions are tried and disposed of therein. If the decision of the court be that the order of the county board of elections shall be set aside, then the court shall enter its order so providing and adjudging that such person is entitled to be registered as a qualified voter in the precinct to which application was originally made, and in such case the name of such person shall be entered on the registration books of that precinct. The court shall not be authorized to order the registration of an person in a precinct to which application was not made prior to the proceeding in court. From the judgment of the superior court an appeal may be taken to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

"Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 6. This Act shall be effective upon its ratification."

1. Article VI, Section 4 of the Constitution of North Carolina is as follows:

"Sec. 4. Qualification for registration.—Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under Section two of this article."

subsequent to 1908, approximately 50 years ago, and that the "grandfather clause", which would render the section void, no longer has any practical application. It is further argued that, if the section be held void, the state has the right to prescribe an educational qualification for suffrage in the exercise of its sovereign power as a state, since the provisions of a state constitution are limitations upon and not grants of power. 11 Am. Jur. p. 619. Attention is called to the fact that nineteen states of the Union,[2] only seven of which are Southern states, prescribe educational qualifications for suffrage which are uniformly upheld[3] and that the Supreme Court has approved them, saying in Guinn v. United States supra 238 U.S. at 360:

> "No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision."

Before we take any action with respect to the Act of March 27, 1957, however, we think that it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution. Government and Civic Employees Organizing Committee etc. v. S. F. Windsor (decided May 13, 1957———U.S. ———. We think, also, that administrative remedies provided by the act should be exhausted before action by the federal courts is invoked. We shall accordingly enter an order staying action herein but retaining jurisdiction for a reasonable time to enable plaintiffs to take action in the courts of North Carolina to obtain an interpretation of the statute and to exhaust administrative remedies thereunder.

Action Stayed.

2. The states which prescribe educational qualifications for suffrage are: *Alabama* Tit. 17, sec. 35, Ala. Code; *Arizona* Ariz. Revised Stat. Title 16, sec. 16-101; *California* Dearing's Cal. Code, Elections, Sec. 220; *Connecticut* Conn. Gen. Stat., Title 11, sec. 991, 992; *Delaware* Del. Code Anno., ch. 15, sec. 1701; *Georgia* Ga. Code Anno., sec. 34-117, 34-120, 34-122; *Louisiana* La. Revised Stat. of 1950, Title 18, sec. 31; *Maine* Revised Statutes of Maine, ch. 3, sec. 2; *Massachusetts* Const.–Articles of Amendment, Art. XX, sec. 122. See also C. 51, sec. 1 of Anno. Laws of Massachusetts; *Mississippi* Miss. Code Anno., sec. 3213; *New Hampshire* Revised State Anno. 55:10–55:16; *New York* New York Consolidated Laws Service, Election Law, sec. 150; *Oklahoma* Tit. 26, sec. 61, Okla. Stat. Ann.; *Oregon* Ore. Compiled Laws Anno. vol. 5, sec. 81-103; *South Carolina* S. C. Code, sec. 23-62; *Virginia* Const., sec. 30, sec. 20, Code of Va., sec. 24-113; *Washington* Remington's Revised Stat. of Wash., sec. 5114-11; *Wyoming* Wyoming Compiled Stat. Anno., sec. 31-1205.

3. United States v. Guinn 238 U.S. 347, 360; Williams v Mississippi 170 U.S. 213; Davis v. Schnell 81 F. Supp. 872, aff. 336 U.S. 933; Trudeau v. Barnes 65 F.2d 563, cert. den. 290 U.S. 659.

REAL PROPERTY
Sale—Tennessee

Lester P. STRATTON v. Mrs. Zoie CONWAY et al.

Supreme Court of Tennessee, April 1, 1957, 301 S.W.2d 332.

SUMMARY: The owner of real property in a previously exclusively "white" neighborhood brought suit in a Tennessee state court against the prior owner of adjacent property. The suit was for money damages for alleged loss in value of plaintiff's property as a result of the sale of the adjoining property to Negroes. The trial court sustained a demurrer to the complaint and dismissed the action. On appeal, the Tennessee Supreme Court held that there was no right of action for damage resulting from such a sale which the defendants had a legal right to make.

BURNETT, Justice.

The question presented by this suit is whether or not the owner of real property may sell it to someone over the objections of an adjoining

owner without being liable in damages to the objector when the person to whom it is sold is a negro and the surrounding property is owned by white persons.

[*Declaration Filed*]

The declaration in this suit was filed by Mr. Stratton against the owner of the adjoining property and the real estate company who had it for sale for damages for the sale of property in a purely white neighborhood to negroes. The declaration was demurred to on various grounds but the determinative ground is, admitting the parties had been damaged by the sale, there was "no warranty of law for the maintenance of such actions." The trial judge sustained the demurrer in toto and dismissed the suit. An appeal has been seasonably perfected, briefs filed and we have heard argument. After a thorough consideration of all the pleadings and briefs and many authorities we are now ready for a determination of the question.

It is conceded in the brief and was in the oral argument before this Court that the question of color or discrimination between the white and negro races is not here involved. It is likewise conceded that the defendants had a right to sell their property to negroes, if they so desired, but it is claimed that by doing so they damaged the property of plaintiff (it is conceded by the demurrer that they did so damage the property in the sum of $2,750) and that they are responsible in damages as a consequence thereof.

[*Shelley v. Kraemer*]

In Shelley v. Kraemer (McGhee v. Sipes), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, courts of last resort of Michigan and Missouri had upheld restrictive covenants as to the occupancy or ownership of property as between whites and negroes. The Supreme Court of the United States in the Shelley v. Kraemer case, supra, held that the action of the State Courts in enforcement of those restrictive covenants constituted acts of the States within the Fourteenth Amendment, and in granting judicial enforcement of the covenants the States denied the purchasers equal protection of the laws. Subsequently in Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1587, the Supreme Court of the United States in an action by the parties involving restrictive covenants against the sale of realty to non-Caucasians for damages, the Court held that the co-covenantor who conveyed his property without incorporating the restriction and thus permitting non-Caucasians to operate the property that an award by the State court of damages against the covenantor for a breach of this restrictive covenant would constitute a State action which would deprive non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

[*Restrictive Covenant Not Involved*]

It is thus argued by the plaintiff in error that under the Jackson case that the Supreme Court of the United States there held that they would not enforce the express discriminatory contract because it transcends the Fourteenth Amendment of the Constitution of the United States, but that in the opinion the Court held that they would not deny just compensation for any result in injuries, flowing from a sale of such property. Thus it is seriously and ably argued here that this present action is bottomed on the fact of resulting damages as a consequence of the sale and not on discrimination. It is argued that this action is not on discrimination but is on the fact solely that the sale "results in the destruction and depreciation of the value of his property. The same consequence would follow the sale to any other person resulting with the same effect. It matters not whether he is white or black, red or yellow, or if a mixture of all, or none."

[*Damnum Absque Injuria*]

It is thus conceded that the act of selling the property is lawful, but it is argued that it is prejudicial. Under such circumstances an act of the kind under the pleadings here is damnum absque injuria. "Literally 'A loss without an injury'. It is a phrase used to describe a loss arising from acts or conditions which do not create a ground of legal redress." 17 C.J., p. 1125; 25 C.J.S., p. 996. Under this quotation will be found literally dozens upon dozens of cases from various States in the United States, including the Supreme Court of the United States particularly the case of Marbury v. Madison, 1 Cranch 137, 164, 5 U.S. 137, 164, 2 L.Ed. 60, and many others. There will also be found a very apt quotation from Blackstone which is:

"If I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true, it is damnum absque injuria (damage without injury); and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law." 3 Blackstone Comm., p. 125.

To the same effect as that above quoted, under the heading Actions, in 1 C.J.S., § 19, p. 1060, will be found a very plausible and reasonable discussion of this question. And to a like effect the authors of American Jurisprudence in Volume 1, of that work, at pages 424 and 425, Sections 32 and 33, under the heading Actions, and the heading Adjoining Landowners, page 505, Section 3, thereof and Section 4, will be found very persuasive and plausible reasoning which in every particular supports the conclusion of the trial judge in sustaining the demurrer herein. Likewise in Volume 52 of Am.Jur., under the headings of Torts, at page 371, thereof, Section 15, the subject will be found discussed at length. In each of these works there are numerous cases cited supporting the conclusion reached by the trial court below.

"Every person is entitled to make a reasonable use of his property. Therefore, while the rightful use of one's own land may not infrequently have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort which might otherwise have been anticipated, this is damnum absque injuria, as to which the law cannot interfere." 1 Am.Jur., p. 505, Sec. 3.

Among the other authorities cited for this statement is our case of Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 11 S.W. 705, 4 L.R.A. 622, which is an opinion by Mr. Justice Lurton. In that opinion among other things he says:

"Life will not be altogether so comfortable. But does the law give damages for such consequential injuries? To entitle a plaintiff to recover damages there must not only be an injury, but the injury must be the result of some wrongful conduct. Where an injury results merely from the lawful and reasonable use of a neighboring estate, no wrong is done and no remedy exists." At page 528 of 87 Tenn., at page 707 of 11 S.W.

Mr. Justice Lurton then cites examples of our light, view and air, etc., cases. Most recent of these is the case of Granberry v. Jones, 188 Tenn. 51, 216 S.W.2d. 721. Of course this had not been published in his life time but is one written by a member of the present Court.

[*Exercise of Lawful Rights*]

The author of American Jurisprudence in the same Section last above quoted from Sec. 3, p. 506, says that:

"The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or whether the injury was the natural consequence, or whether the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also, public policy."

This is the test. And under this test there has been no legal violation of any of the rights of others by the sale of this property. This act was done in a lawful manner in the exercise of a legal right of the defendants and in doing so no law was violated and thus the action clearly is not actionable under all the authorities and under reason.

The most recent case that we have found (and the most nearly in point) is that of Latchis v. John, 117 Vt. 110, 85 A.2d 575, 577, 32 A.L.R.2d 1203. In this case a fruit stand was erected on residential property but this did not constitute a nuisance and even though the trial court found that by reason of this fruit stand plaintiff's property had been depreciated in value to a certain amount it was held that no suit for damages could thus be maintained. The Court after referring briefly to the maxim above quoted of damnum absque injuria concluded thus:

"Here, the defendants' act was lawful and no right of the plaintiff was violated, so he was not entitled to recover damages."

We thus must conclude that the action of the trial court in sustaining the demurrer is correct and it is affirmed with costs.

ATTORNEYS
Bar Associations—District of Columbia

Alfred E. GOSHORN et al. v. BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, a corporation.

United States District Court, District of Columbia, June 7, 1957, Civ. No. 2393-56.

SUMMARY: The bylaws of the Bar Association of the District of Columbia have restricted membership in the Association to white persons. Amendment of the bylaws requires the affirmative vote of two-thirds of the active members present at a meeting. Motions to amend the bylaws so as to remove the "white" restriction from membership have been made at several meetings of the Association. At a meeting on May 8, 1956, such a motion was put to the members. The motion was acted on by voice vote and the president, as presiding officer, declared the motion to be carried by a two-thirds majority. Members of the Association then brought an action in federal district court to enjoin the officers of the Association from putting the amendment into effect on the grounds that the president's ruling was in error, that there had not been a two-thirds majority in favor of the motion and that the presiding officer had not followed Robert's Rules of Order in conducting the meeting as required by the bylaws. The court ruled in favor of the plaintiff members, stating also that the Fifth Amendment to the United States Constitution is not applicable to such a private association.

WILKIN, District Judge.

The complaint seeks a declaratory judgment invalidating the action of the defendant association at its meeting of May 8, 1956, with reference to the proposed amendment to the bylaws of the association by deleting the word "white" from article I which fixed and classified the eligibility of members, and the Complaint prayed for an injunction restraining officers of the association from any action based on, or in furtherance of, the procedure at such meeting.

The answer alleges that the complaint fails to state a claim against the defendant upon which relief can be granted: alleges that the action taken by the association was proper and in full conformity with its bylaws, alleges that the plaintiffs have waived any objections by their failure to take proper and timely action; alleges that the plaintiffs have not suffered any injury to themselves entitling them to the relief asked; alleges that this court lacks power to interfere in the affairs of the private professional organization in the manner sought by the complaint; alleges that this court cannot grant relief to the plaintiffs without denying rights protected by the 5th amendment to the Constitution and the public policy of the United States.

Two judges of this court, acting separately, denied motions for summary judgment. The case then came on for trial on the merits to determine the disputed issues of fact and questions of law. The principal issue was the validity or invalidity of the declaration of the President, based on a voice vote, that the resolution for the amendment had carried by a two-thirds vote of active members present, and that the amendment was, therefore, adopted. The determination of that issue depends on the conditions and circumstances before, at the time of, and after the voice vote. The disagreements and differences in testimony related to details of minor or secondary importance. As to the most essential facts and circumstances, there was general agreement.

[*Bylaws*]

"ARTICLE I—MEMBERSHIP

"Section I. Classes: The following classes shall constitute the membership of the association.

"A. Active members: All members of the association at the date of the adoption of these bylaws shall be classified as active members.

"White members of the bar of the District Court of the United States for the District of Columbia, in good standing, in active practice in the District of Columbia, shall be eligible to active membership in the association, as hereinafter provided.

"B. Associate members: White residents and nonresidents of the District of Columbia who are members of the bar, in good

standing, of the highest court of any State or Territory, and who are not engaged in or attempting to engage in active practice in the District of Columbia, may be admitted to associate membership, as hereinafter provided.

"White members of the bar of the District Court of the United States for the District of Columbia, in good standing, not in active practice, may be admitted to associate membership, as hereinafter provided.

* * *

"ARTICLE VI—MEETINGS

"Sec. 5. Quorum: At any meeting of the association, the presence of 100 active members shall be necessary to constitute a quorum.

"Sec. 8. Parliamentary rules: The parliamentary rules of practice contained in Roberts' Rules of Order, as revised, shall govern the association in all cases to which they are applicable and in which they are not inconsistent with the bylaws or the special rules of order of this association."

[*Robert's Rules of Order*]

And there was no dispute as to the following provisions of Robert's Rules of Order:

"The vote shall always be taken first by the voice (viva voce) or by show of hands (the latter method being often used in small assemblies), except in the case of motions requiring a two-thirds vote when a rising vote should be taken at first." (Sec. IX, p. 42, Robert's Rules of Order.)

"A division of the assembly may be called for, without obtaining the floor, at any time after the question has been put, even after the vote has been announced, and another has the floor, provided the vote was taken viva voce, or by show of hands, and is called for before another motion has been made. This call, or motion, is made by saying, 'I call for a division,' or 'I doubt the vote,' or simply by calling out 'division.' It does not require a second, and cannot be debated, or amended, or have any subsidiary motion applied to it. As soon as a division is called for, the chair proceeds again to take the vote, this time by having the affirmative rise, and then when they are seated, having the negative rise * * *." (Sec. 25, p. 95, Robert's Rules of Order.)

It was admitted that there was no count of active and associate members.

It was agreed that only a voice vote was taken.

The weight of evidence indicated that there was a substantial volume of sound as to both "yeas" and "nays." One or two witnesses indicated that the sound volume of the two votes was about equal, and most of the witnesses testified that is was impossible for anyone to determine positively whether those voting in the affirmative represented two-thirds of the qualified members.

It was agreed that the meeting had an unusually large attendance, estimated to be about 520 persons. The meeting was held in the Williamsburg Room of the Mayflower Hotel.

There was a dispute and disparity of testimony as to whether or not a division had been called for specifically.

[*Minutes of Meeting*]

The minutes of the meeting recite, at page 379 of defendant's exhibit No. 2:

"Mr. Alfred F. Goshorn rose to a point of order with reference to those persons in attendance and stated that there was no way to determine whether they were entitled to vote or not. He thereupon moved that the motion be tabled. The chair ruled the motion out of order stating that when the time came those not eligible to vote could be requested not to do so and that any member present could request that there be a division so that ineligible persons could step to one side of the room and only those eligible to vote would do so."

The testimony of the president and secretary supported the statement of the minutes. Other members of the association who testified stated that the president said, with a gesture of the hand, that when the vote was taken, he would ask all associate members and guests to move to one side of the room. It was conceded, however, that no such separation occurred. After some preliminary points of order and motions, relating to presence of persons ineligible to vote and method of voting, were disposed of, the president declared that the pending action was on the motion to adopt the amendment. One member spoke in favor of the amendment and no one spoke in opposition. The minutes recite:

"Upon a call for the question the Chair

asked for the 'ayes' and then the 'nays' on Mr. Moore's motion. The vote having been taken by voice the Chair ruled that the motion had been passed and that the 'ayes' were more than the required two-thirds vote of the active members in good standing present."

The minutes continue:

"Mr. Paul Lee Sweeny rose to a point of order and appeal from the ruling of the chair stating that the Chair could not rule on whether the affirmative vote on Mr. Moore's motion had been the required two-thirds. The Chair put the appeal to a voice vote, after which the chair ruled that the appeal was denied and the original ruling upheld."

The president and secretary testified that the statement in the minutes was correct. Mr. Sweeny, however, testified that he arose and objected to the method of taking the vote and that, when the Chair ruled him out of order, he then appealed from the ruling of the Chair. There was other diversity of testimony regarding the minutes on this point, some supporting the statement in the minutes and some supporting Mr. Sweeny's statement.

[*Meeting Confused*]

All the testimony, however, agreed that, after the president announced the passage of the motion, there was great confusion. The president himself referred to it as "cheering"; others referred to it as "applause" and "noise." Witnesses for the plaintiffs referred to the occurrence as "bedlam" and "hubbub." The president and the secretary and some other witnesses testified that they did not hear anyone calling for a division, in that exact word. Many witnesses testified, however, that there were members standing and calling for recognition. A number of the witnesses said that they heard calls for division, and some witnesses said that they themselves had so called. The only member recognized by the chair, however, was Mr. Sweeny, and when his objection and appeal were disposed of, the president called for consideration of other business.

Thereafter, certain members of the association presented petitions and protests, dated May 16 and May 14, 1956, to the board of directors of the defendant association. (Plaintiff's exhibits Nos. 3A, 3B, 3C.) The board declined to take any action thereon, and no change in the minutes of the May 8 meeting was made by the Association at its next meeting, as shown by defendant's exhibit No. 3.

[*Motion Previously Rejected*]

Another fact emphasized by the plaintiffs was admitted by the defendant—the same proposal for amendment had been submitted twice, or possibly three times, by referendum, and had failed of adoption because the votes in favor did not meet the two-thirds requirement.

This court is constrained by the admissions and the weight of the testimony to find that the objections, motions, and protests at the meeting of May 8, 1956, were sufficient to apprise the chairman that the method of taking the vote was objected to, and that a division and visible count of members for and members against the motion was desired. The Court concluded that it was a violation of the by-laws and of Robert's Rules of Order for the presiding officer to fail to call for a rising vote. The Court is impelled to such finding and conclusion especially by the fact that highly-respected members of the association testified in support of the plaintiffs, in spite of the fact that they had favored, and voted for, the proposed amendment. One of these witnesses said that, regardless of the language used, it was clearly apparent that a number of persons were demanding a division in the sense that they wanted the members who voted for or against the proposed amendment to be counted for the purpose of determining with certainty whether or not the proposed amendment had been adopted by at least a two-thirds vote of the members entitled to vote, and that such demands were not honored. In an affidavit filed in this case, that witness had said:

"I insist upon saying at this time that the board of directors of the Bar Association of the District of Columbia will represent me in my status as a member far better if they will put a speedy end to this sorry squabble which is injuring the prestige of the bar association and of the legal profession, and will resubmit the controversial amendment to the members of the association and poll a vote with respect thereto in such manner that there will be no doubt as to the result and the legality of the proceeding. I feel that the value of my membership in the association will be further impaired by the

> prolongation of a situation which has caused many of my respected associates to believe that their rights have been violated and which at the same time makes it embarrassing for the self-respecting Negro members of the bar to apply for membership in the association."

This court finds and holds that the allegations of the answer, in view of all the circumstances and the law, are not sufficient to prevent the relief prayed for in the complaint.

[*No Bad Faith Alleged*]

It was argued, in support of the defense, that the plaintiffs would have to prove fraud and bad faith on the part of the president and secretary in order to sustain their complaint. Counsel for the plaintiffs, however, very graciously stated that the plaintiffs neither alleged nor implied any bad faith or willful misconduct. He spoke of the officers of the association in high praise and conceded that the chairman was trying to effectuate the sense of the meeting. He placed his prayer for relief squarely on the illegality of what was done, alleging firmly that it was contrary to both the letter and spirit of the bylaws of the association and of Robert's Rules of Order.

With such statements of counsel for plaintiffs, this court concurs. It imputes no improper motives in the officers, but finds illegality in the action of the meeting. Its judgment is not against the purpose of the amendment, but against the attempted method of adoption. The tenor of all the testimony creates the impression that the meeting of May 8, 1956, was surcharged with feeling and emotion incompatible with calm deliberation and judicious action. Leaders of reform movements seem prone to become overzealous. They then think that, because their objective is commendable, any method of attaining it is justifiable. In other words, they assume that the end justifies the means. But that theory can never be sustained in a court of law. If it were approved, the law would lose its virtue as a social and political bond. We would cease to have a government of and by law. We would then be ruled by the capricious, arbitrary, and tyrannous conduct of majorities and those in office.

Discipline is an inherent requirement of human nature in the individual and in the body politic. History reveals that when discipline is not self-imposed, it must be superimposed. The life of democracy depends on its observance of the law. In determining its judgment, a court of law must consider its effect, not only on the instant case, but also on all similar cases. The affirmance of a voice vote in the circumstances of this case would reduce to a nullity the provisions for two-thirds votes by the bylaws of all associations and corporations.

[*History of Two-Thirds Rule*]

This court is not unmindful that the provisions for a two-thirds vote in bylaws or constitution has been severely criticized as impractical, more harmful than beneficial, and a means by which an arbitrary minority may thwart the will of the majority. Such criticism has been most prevalent against the provision in our Federal Constitution which requires a two-thirds vote for Senate approval of treaties. It has been referred to by respected authority as "an outmoded flaw in our Constitution", "a fatal defect." Edward S. Corwin, in The Constitution and World Organization, has said, "The two-thirds rule was an anomaly before it was ever put into operation, and everything that has happened since 1789, both within the constitutional system and outside of it, has contributed to aggravate its abnormity." (For further discussion and authorities, see The United States and the World Court, by Denna Frank Fleming, ch. X.)

This consideration was not advanced in this case. It is mentioned here merely to say that if those who are irked by the two-thirds rule will not move to repeal it, they should not try to evade it. As long as it is the law, it should be observed and obeyed, especially by lawyers.

[*Status of Bar Association*]

The allegations of the answer that this court lacks jurisdiction and will not interfere in the affairs of a private corporation were disposed of by the ruling on the defendant's motion for summary judgment, but it seems well for the court to state here that this defendant association is an organization of members of the bar of this court. From earliest times, the courts of England and of this country have assumed, and exercised, a supervisory jurisdiction over organizations and assemblies of persons licensed by the court to practice law. It was judicially

determined by Lord Mansfield that, while the courts had no jurisdiction over the inns of court "according to the general law of the land," yet, "in every instance their conduct is subject to the control of the judges as visitors."

This court, and the court of appeals of this judicial district, have taken jurisdiction of other cases questioning the action of the bar association. (U. S. ex rel Robinson v. Bar Association of the District of Columbia (91 U. S. App. D. C. 5, 197 F.2d 408)); U. S. ex rel Noel v. Carmody (80 U. S. App. D. C. 58, 148 F.2d 684).

While it may be conceded that the plaintiffs have sustained no pecuniary loss or direct property damage from the action complained of, yet it is the view of this court that they have acquired, by joining and paying dues to the defendant association, an interest in the association and its property, and privileges which entitle them to assert that the character or membership of the association shall not be changed except in accordance with the bylaws of the association (said to be the oldest in America).

[*Fifth Amendment Rights*]

It is the opinion of this court that the assertion of such rights and interests does not violate rights protected by the fifth amendment of the Constitution or the public policy of the United States. The Legal Register for the District of Columbia lists a number of bar associations besides the defendant, which have limited or restricted membership. In addition to the defendant bar association, there is the Washington Bar Association, the Women's Bar Association, the Federal Bar Association. There is also a Patent Bar Association and a Barristers Club or Association. The legality and propriety of such associations have not been questioned, and members who have joined such associations have a right to insist that they continue to represent the special interests for which they were organized until their purpose and objective are changed in accordance with the basic law of the organization. (Ross et al v. Evert et al (Sup. Ct., Wis., Apr. 9, 1957.)

People of any race, religion, or political faith may assemble and associate for the advancement of their interests. No sound public policy would destroy the interesting diversity of life. If the aim and end of democracy should be to reduce all men to the same shape and shade and common opinion, then it could not and should not survive. It would counter one of the fundamental principles of evolution.

It is apparent to any person of fair mind that, if the defendant association wishes to represent and to speak for all the lawyers of the district, then in all fairness it ought to make all lawyers eligible for membership. If it does not do so, then members of the bar who champion the proposed amendment ought to unite with other members of like mind and organize an all-inclusive bar association for the district which would be authorized to speak and act for all persons admitted to practice before the United States district court.

The defendant association, for a long time, has restricted its membership, and some of its members emphasize that object and purpose of the association which is "to increase the mutual improvement and social intercourse of its members." If they feel that the social purposes of a limited membership are of more importance than being the agency of the entire bar of the district, their wishes and desires should not be overridden or denied except by action of the Association taken in accordance with the bylaws.

Judgment for plaintiffs. This opinion may serve as findings of fact and conclusions of law, and counsel may prepare and submit a final order.

LEGISLATURES

EDUCATION

Public Schools—Florida

The 1957 Florida Legislature passed a so-called "Last Resort Bill" (H.B. No. 671, 1957) which would have authorized local governing authorities to suspend the operation of any public facility or institution in any area under its jurisdiction when the "standards, or health, or safety, or welfare, or peace, or morals of the community" were threatened. On June 6, 1957, Governor Collins returned the bill to the legislature with his objections. The veto message states that authority to take emergency measures to protect the public welfare already exists and that the bill would be a threat to the public school system of the state. The bill later failed of enactment over the veto. The governor's veto message follows:

STATE OF FLORIDA
OFFICE OF THE GOVERNOR
TALLAHASSEE

June 6, 1957

Honorable Doyle E. Connor
Speaker, House of Representatives
Capitol Building
Tallahassee, Florida

Sir:

Pursuant to the authority vested in me as Governor of Florida, under the provisions of Section 28, Article III, of the Constitution of this State, I hereby transmit to you, with my objections, House Bill No. 671, enacted by the Legislature of 1957, and entitled:

"AN ACT RELATING TO PUBLIC FACILITIES AND INSTITUTIONS; AUTHORIZING LOCAL AUTHORITIES TO SUSPEND UNDER CERTAIN CIRCUMSTANCES ANY PUBLIC FACILITY OR INSTITUTION WITHIN ITS JURISDICTION AS AN EMERGENCY MEASURE IN THE PUBLIC INTEREST PURSUANT TO PETITION AND REFERENDUM; PROVIDING PROCEDURES FOR THE REACTIVATION OF A SUSPENDED PUBLIC FACILITY OR INSTITUTION; PROVIDING AN EFFECTIVE DATE."

Contrary to the impression which has been given, this bill is extremely broad and is by no means restricted to integration in the public schools. It seeks to authorize any local governing authority to suspend the operation of *any public facility or institution* in any area over which such authority has jurisdiction when the "standards, or health, or safety, or welfare, or peace, or morals of the community . . ." are threatened.

The impression has been given that the law is to be resorted to in order to close the public schools of a community only after integration occurs. Actually, all that is required under its terms is that there be a mere "threat" and that the threat be to the "standards, health, safety, welfare, peace or morals of the community." This, in my opinion, would be a come-on to the professional agitators and extremists and on many issues other than integration could result in a community being torn asunder under a siege of hysteria emanating from mere suspicion and propaganda. Any of our fine communities could see its school system wrecked by the handiwork of a scandal monger. The act would be the spring board and stimulant not only for race baiters and bigots, but even worse, it could be the weapon of vindictive, scheming and unscrupulous elements bent on venting their spleen for personal reasons only.

For the reasons aforesaid it occurs to me that this should not be referred to as the "Last Resort Bill" but actually the "First Resort Bill," that is, the first resort for the agitator.

Insofar as the public school system is concerned, I view the bill as wholly unnecessary. Under the present school code (Section 230.23(4) (F), the respective county boards of

public instruction of this State have the express power to "adopt regulations for the closing of schools during an emergency and to provide for the payment of salaries of the members of the instructional staff on such occasions." Furthermore, Chapters 313.89 and 313.90 of the laws of this State, enacted by the Legislature in the Extraordinary Session last year, specifically vest in the Governor the power to promulgate emergency rules and regulations with respect to the use of public facilities, including schools.

In addition to the foregoing reasons, sound legal counsel have advised me that the title to the bill is clearly defective and that the tenure and retirement rights of the teachers of this State may be placed in jeopardy as a result. I have also been advised by the State Superintendent of Public Instruction that it would be next to impossible to administer the legislation. Children from closed schools would have to be transferred to nearby public schools, which in turn would have to transfer pupils because of overcrowding, and the result well could be a chain reaction resulting in the closing of school after school.

I also regard the proposed legislation as a definite threat to the validity of the program passed in the recent Extraordinary Session, which to date has been completely effective.

Therefore, if allowed to stand, it is my opinion that the bill would be the unnecessary stimulant for discord among our people, that it may place in jeopardy the tenure and retirement rights of the teachers, that it is unworkable and that it places in serious jeopardy our whole program to meet the serious problems presented to us under the unfortunate decision of the Supreme Court of the United States.

This measure ignores a workable approach to vexing problems and encourages the substitution of a chaotic abandonment of reason.

It pours across the face of a great State the highly combustible fuel of racial hatred and beckons to firebrands and the irresponsible to come and ignite the flames.

When men harbor hatred in their hearts for their fellowmen, it is a regrettable thing.

But when government is used as an instrument for translating racial hatred into a force to destroy the very institutions which nurture and sustain it, then such is an even more serious wrong, and I condemn it.

For the foregoing reasons, I, therefore, withhold my approval from House Bill No. 671, Regular Session of the Legislature, 1957, and do hereby veto the same.

Respectfully,

/s/ LEROY COLLINS
Governor

GOVERNMENTAL FACILITIES
Redevelopment Agencies—California

The City of Los Angeles, California, has enacted an ordinance (No. 109,548, approved June 19, 1957) which will require the Community Redevelopment Agency to insert clauses prohibiting discrimination on the basis of race, creed, color, national origin or ancestry in all contracts, leases and deeds entered into by the Agency.

ORDINANCE NO. 109,548

An Ordinance requiring the submission of deeds, leases, and contracts of the Community Redevelopment Agency to the Council for approval and requiring clauses therein so as to provide for the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of any land in any redevelopment project without discrimination or segregation based upon race, color, creed, national origin or ancestry.

WHEREAS, the Council of the City of Los Angeles finds and determines that discrimination or segregation with respect to the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of any land in a redevelopment project, based upon race, color, creed, national origin or ancestry, is not in the public interest, and that all deeds, leases, and contracts of the Community Redevelopment Agency shall contain provisions prohibiting such discrimination,

Now, therefore, the people of the City of Los Angeles do ordain as follows:

Section 1. Every final redevelopment plan prior to its submission to the City Council for approval shall contain a provision requiring the Community Redevelopment Agency to submit to the City Council for approval all deeds, leases, or contracts for the sale, lease, sub-lease, or other transfer of any land in a redevelopment project and such deeds, leases or contracts shall contain the non-discrimination or non-segregation clauses required by Section 3 hereof.

Sec. 2. It is the policy of the City that no deed, lease, or contract for the sale, lease, sublease, or other transfer of any land in a redevelopment project shall be approved unless it contains the provisions contained in Section 3 hereof.

Sec. 3. Express provisions shall be included in all deeds, leases and contracts which the Redevelopment Agency proposes to enter into with respect to the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of any land in a redevelopment project, in substantially the following form, to wit:

(a) *In Deeds*—"The grantee herein covenants by and for himself, his heirs, executors, administrators and assigns, and all persons claiming under or through them, that there shall be no discrimination against, or segregation of, any person or group of persons on account of race, color, creed, national origin or ancestry in the sale, lease, sub-lease, transfer, use, occupancy, tenure or enjoyment of the premises herein conveyed, nor shall the grantee himself, or any person claiming under or through him, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sub-tenants, sub-lessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) *In Leases*—"The lessee herein covenants by and for himself, his heirs, executors, administrators and assigns, and all persons claiming under or through them and this lease is made and accepted upon and subject to the following conditions: 1. That there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, creed, national origin or ancestry, in the leasing, sub-leasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased, nor shall the lessee himself, or any person claiming under or through him, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy of tenants, lessees, sub-lessees, sub-tenants or vendees in the premises herein leased."

(c) *In Contracts* entered into by the redevelopment Agency relating to the sale, transfer or leasing of land, or any interest therein acquired by such Agency within any redevelopment area, or project, the foregoing provisions in substantially the forms set forth shall be included and such contracts shall further provide that the foregoing provisions shall be binding upon and shall obligate the contracting party or parties and any subcontracting party or parties, or other transferees under said instrument.

Sec. 4. Separability. If any portion of this ordinance is held invalid, the remainder shall be unaffected thereby.

Sec. 5. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of May 29, 1957 and was passed at its meeting of June 10, 1957.

WALTER C. PETERSON,
City Clerk.
By A. M. Morris, Deputy.

Approved June 19, 1957.

NORRIS POULSON,
Mayor.

PUBLIC ACCOMMODATIONS
Anti-discrimination Act—Vermont

Act No. 109 of the General Assembly of Vermont, approved April 23, 1957, prohibits discrimination on the basis of race, creed, color or national origin by any establishment which offers services, facilities or goods to the general public. The act provides for enforcement by criminal penalties.

ACT NO. 109 [S. 104]—AN ACT RELATING TO THE FULL AND EQUAL ENJOYMENT OF PUBLIC ACCOMMODATIONS.

It is hereby enacted by the General Assembly of the State of Vermont:

Section 1. *Public Accommodations; discrimination prohibited.* An owner or operator of a place of public accommodation or an agent or employee of said owner or operator shall not, because of race, creed, color or national origin of any person, refuse, withhold from or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation. A place of public accommodation within the meaning of this act means any establishment which caters or offers its service or facilities or goods to the general public.

Section 2. *Penalty.* A person who violates a provision of Section 1 of this act shall be fined not more than $500.00 or imprisoned not more than thirty days, or both.

Section 3. This act shall take effect from its passage.

EMPLOYMENT
Fair Employment Laws—California

The Board of Supervisors of the City and County of San Francisco, California, on July 10, 1957, enacted Ordinance No. 10478 which prohibits discrimination in employment in the city on the basis of race, color, religion, ancestry or national origin. The ordinance establishes a Commission on Equal Employment Opportunity and provides for investigatory and enforcement powers for the Commission.

FILE NO. 15143-2 ORD. NO. 10478
(Series of 1939)

Ordinance prohibiting discriminatory practices in employment because of race, color, religion, ancestry, national origin or place of birth by employers, employment agencies, labor organizations, and others: creating a commission on equal employment opportunity, and prescribing its duties and powers generally: and providing penalties for the violation of this ordinance.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings.

The population of this City and County is composed of people of various racial, religious and ethnic groups. The practice of discrimination in employment on the grounds of race, religion, color, ancestry, national origin or place of birth exists in the City and County of San Francisco, as elsewhere, and such discriminatory practices are inimical to the public welfare and good order and require the exercise of the legislative power to aid in their elimination. Such discriminatory practices tend to prevent members of various racial, religious and ethnic groups from reaching the full development of their individual potentialities, from providing adequately for the economic security of their families and the education of their children and from making the contribution to the industrial, business and civic life of this City and County of which they are capable.

Experience of other large cities has proved that legislation prohibiting such employment discrimination and providing means for its redress and prevention lessens the amount of such

discrimination and directly promotes the public welfare and good government.

Section 2. Declaration of Policy.

It is hereby declared that every inhabitant of this City and County has the right to equal employment opportunity without being subjected to discrimination because of race, religion, color, ancestry, national origin or place of birth.

Section 3. Scope of Ordinance.

This ordinance applies to employment practices within the territorial limits of this City and County and to the hiring of persons elsewhere for work to be performed within the City and County where such hiring outside of the City and County is for the purpose of evading the provisions and requirements of this ordinance.

Section 4. Definitions.

(a) The term "person" wherever used in this ordinance means and includes any individual, partnership, corporation, labor organization, or other association, including those acting in a fiduciary or representative capacity whether appointed by a court or otherwise. The term "person" as applied to partnerships, labor organizations, or other associations includes their members and as applied to corporations includes their officers.

(b) The term "employer" wherever used in this ordinance means and includes the City and County, and

1. All departments, officers, agents or employees of the City and County and its instrumentalities.

2. All contractors and their sub-contractors engaged in the performance of any contract entered into with this City and County or any of its contracting agencies; and

3. All private employers having five (5) or more employees in this City and County exclusive of the parents, spouse, or children of such employer, or his domestic servants. The term "employer," however, shall not include religious or social corporations or associations not organized or operated for private profit.

(c) The term "labor organization" wherever used in this ordinance means and includes any organization in this City and County which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in relation to employment.

(d) The term "employment agency" wherever used in this ordinance means and includes any person engaging in business or regularly undertaking in this City and County, with or without compensation, to procure opportunities for employment or to procure, recruit, refer or place employees.

(e) The term "employment" wherever used in this ordinance does not apply to the employment of individuals to serve as domestic servants nor to the employment of individuals by religious or social corporations or associations not organized or operated for private profit.

(f) The term "discrimination" includes but is not limited to "segregation."

(g) The term "commission" means the City and County of San Francisco Commission on Equal Employment Opportunity.

Section 5. Unlawful Employment Practices.

It shall be an unlawful employment practice, except where based upon applicable security regulations established by the United States, by the State of California, or by the City or County of San Francisco:

(a) For any employer to refuse to hire any individual or to otherwise discriminate against any individual with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or benefits of employment because of race, color, religion, ancestry, national origin or place of birth.

A determination or choice by the employer based upon standards or criteria uniformly, fairly and impartially applied to all applicants or persons considered shall not constitute a violation of this ordinance.

If the employer in fact makes occupational qualifications the basis of his determination, proof of discrimination must include proof that complainant is better qualified than the individual selected promoted or retained.

(b) (1) For any employer, employment agency or labor organization to use any form of application for employment or membership containing questions or entries regarding race, color, religion, ancestry, or national origin;

(2) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry or national origin;

(3) It shall be permissible and lawful for an employer, subsequent to the employment of any individual, to require, secure and record any such information concerning an employee, including a photograph of such employee, if such inquiries are reasonably necessary to the operation of the employer's firm or business and such information is not used for the purpose of violating this ordinance. The right to require, secure and record such information shall be subject to the power of the Commission to impose limitations thereon in appropriate cases.

(c) For any employer, employment agency or labor organization to announce any policy or to cause to be published or circulated any notice, information, or advertisement relating to employment or membership which indicates any preference, limitation, specification, or discrimination because of race, color, religion, ancestry, national origin or place of birth;

(d) For any employment agency to fail or refuse to classify properly or refer for employment or otherwise discriminate against any individual because of race, color, religion, ancestry, national origin or place of birth.

(e) For any labor organization to discriminate against any individual in any way which would prevent his acquiring, or would terminate or limit, or otherwise adversely affect his union membership or his employment opportunities including his status as an applicant, his tenure, compensation, promotion, discharge or any other terms, conditions or privileges related to employment because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employer, employment agency or labor organization to discriminate against any individual because he has lawfully opposed any practice forbidden by this ordinance or because he had made a complaint or testified or assisted in any manner in any investigation or proceeding under this ordinance.

(g) For any person to obstruct or prevent any person from complying with the provisions of this ordinance or any order issued thereunder or to attempt to commit or cause to be committed any act declared by this ordinance to be an unlawful employment practice.

The burden of proving the existence of an unlawful employment practice shall be on the party holding the affirmative of the issue as required by Section 1981 of the Code of Civil Procedure of the State of California. In cases of alleged discrimination against individuals, evidence of a pattern of employment or quota system in existence subsequent to the effective date of this ordinance shall be admissible.

None of the acts made unlawful by subsections (a) through (g) of this section shall be unlawful employment practices if the employment, membership, or service in question by its unique nature requires classifications which include any of the forbidden criteria. The burden of proof shall be upon the person asserting the unique nature of the employment, membership or service to establish such fact.

No employer shall be liable for any discrimination practiced by a labor organization unless such employer participates in or co-operates with such acts of discrimination by such labor organization. The fact that the employer agrees to secure all new employees from a labor organization or agrees to give the labor organization an opportunity to fill vacancies in employment or the fact that the employer agrees with the labor organization to recognize prior rights to employment based on seniority or previous employment in the industry does not, of itself, constitute participation or co-operation by the employer in any discrimination practiced by the labor organization.

Notwithstanding any other provision of this ordinance, it shall not be an unlawful employment practice for any employer, employment agency, or labor organization to require citizenship or residence qualifications, or both, as a condition of employment, membership, or service on a uniform, nondiscriminatory basis.

Section 6. Commission on Equal Employment Opportunity.

(a) The City and County of San Francisco Commission on Equal Employment Opportunity shall consist of seven (7) members to be appointed by the Mayor with the approval of the Board of Supervisors. Two (2) of the members who are first appointed shall be designated to serve for terms of one (1) year, two (2) for two (2) years, two (2) for three (3) years and one for four (4) years from the date of their appointments. Thereafter, members shall be appointed as aforesaid for a term of office of four (4) years, except that all of the vacancies occurring during a term shall be filled for the unexpired term. A member shall hold office until his successor has been appointed and has qualified. The Mayor shall designate which of the members of the agency appointed shall be the first chairman, but

when the office of the chairman of the Commission becomes vacant thereafter the Commission shall elect a chairman from among its members. The term of office as chairman of the Commission shall be for the calendar year or for that portion thereof remaining after each such chairman is designated or elected. Any member of the Commission may be removed by the Mayor upon notice and hearing for neglect of duty or malfeasance in office but for no other cause.

It shall constitute malfeasance in office for any Commissioner to divulge or reveal to any person, except the parties to the proceedings, members of the Commission and its staff, any evidence or information obtained in any proceedings pursuant to Section 8(b) hereof.

It shall constitute malfeasance in office for any Commissioner to divulge or reveal to any person, except to the parties to the proceedings, members of the Commission and its staff or the City Attorney under and pursuant to Section 9 hereof, any evidence or information obtained in any proceedings pursuant to Section 8(c) hereof.

(b) The Board of Supervisors shall provide funds to compensate the Commissioners and to pay for an Executive Secretary and such other staff services and facilities as may be required by the Commission.

Any employee of the Commission who shall divulge or reveal to any person other than parties to the proceedings, members of the Commission and its staff any evidence or information obtained under or pursuant to Section 8 (b) hereof, shall upon being found guilty by the Commission be subject to dismissal.

Any employee of the Commission who shall divulge or reveal any evidence or information obtained under Section 8(c) hereof to any person, except to parties to the proceedings, members of the Commission and its staff and the City Attorney, under and pursuant to Section 9 hereof, shall upon being found guilty by the Commission be subject to dismissal.

Section 7. Powers and Duties.

The Commission on Equal Employment Opportunity shall:

(a) Formulate plans of education to promote fair employment practices by persons subject to this ordinance.

(b) Make technical studies and prepare and disseminate educational material relating to discrimination and ways and means of eliminating it.

(c) Confer, co-operate with, and furnish technical assistance to persons subject to this ordinance in formulating educational programs for elimination of discrimination.

(d) Receive, investigate and seek to adjust all complaints of discrimination as herein provided.

(e) Make specific and detailed recommendations to the interested parties as to the method of eliminating discrimination.

(f) Render to the Mayor from time to time, or upon request, but not less than annually, a report of its activities.

(g) Make and publish reports of case histories of conciliation settlements made under this ordinance which in its judgment will effectuate the purposes of this ordinance. Reports of case histories of conciliation settlements shall not, unless the consent of the parties is first obtained, include names or other facts which might clearly identify the parties; but it shall be mandatory to publish representative case histories from time to time for the guidance and education of the public.

(h) Initiate complaints as provided in Section 8(a) hereof.

(i) Refer unsettled complaints to the City Attorney as provided in Section 9 hereof.

Section 8. Adjustment and Settlement of Complaints.

(a) All complaints before the Commission shall be written, signed, properly verified and filed by the individual who alleges discrimination against him within ninety (90) days after the alleged discriminatory act is committed, except that complaints alleging violation of Section 5(b) (1), (c), (f) and (g) hereof may be initiated by the Commission itself within ninety (90) days after the alleged discriminatory act is committed. A copy of such complaint shall be furnished to the person charged at the time of filing. Such complaint shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of and shall set forth the particulars thereof and contain such other information as may be required by the rules and regulation of the Commission.

Any employer whose employees, or some of whose employees, obstruct or prevent any person from complying with the provisions of this ordinance, or attempt to do so, may file with the Commission a verified complaint asking assistance by conciliation or remedial action.

(b) Upon the filing of any complaint a member of the Commission shall make a full and prompt investigation in connection therewith. In such case the Commissioner may utilize the services of a staff assistant working under his direct supervision. If, upon such investigation, the Commissioner shall find that the person charged in the complaint has not engaged in or is not engaging in any unlawful employment practice, the complaint shall be dismissed.

If the Commissioner shall determine after such investigation that probable cause exists for the allegations made in the complaint, he shall endeavor to eliminate the unlawful employment practice charged in the complaint by means of conciliation and persuasion. Within the limits set forth in Section 9(c) the Commissioner may recommend such affirmative action as the case may require.

(c) In case of failure to eliminate the unlawful employment practice by the means provided in Section 8(b), a quorum of the Commission shall convene for the purpose of reviewing the matter and shall, by conciliation and mediation, endeavor to eliminate the discrimination charged. Such proceedings shall be private. In furtherance of such conciliation and mediation the Commission may make specific recommendations to the parties but such recommendations shall not constitute a decision, finding of fact, judgment or order of the Commission, or be binding upon, or be admissible in any court in any subsequent proceedings under Section 9 hereof. Within the limits set forth in Section 9(c) the Commission may recommend such affirmative action as the case may require.

(d) In the performance of its duties under the provisions of Section 8(c) of this ordinance, the Commission, by majority vote, may require by subpoena the attendance of any person and/or the production of any relevant papers, documents or records under his control which are relevant and reasonably necessary to the inquiry. The Commission shall have no other power of subpoena.

(e) All evidence and information given to or obtained by the Commission in any proceedings under the provisions of Section 8(b) hereof shall be confidential and no such evidence or information shall be divulged or revealed to any person other than parties to the proceedings, members of the Commission and its staff or used against any person at any time by any member or employee of the Commission.

All evidence and information given to, or obtained by the Commission in any proceedings under the provisions of Section 8(c) hereof shall be confidential and no such evidence or information shall be divulged or revealed to any person except to parties to the proceedings, members of the Commission and its staff, and the City Attorney in cases arising under the provisions of Section 9 hereof.

The voluntary giving or furnishing of any information or evidence to the Commission in any proceedings under the provisions of Section 8(b) hereof shall not constitute a waiver of any legal or constitutional privileges or defenses.

(f) If the parties accept the recommendations of the Commission the matter shall be deemed settled and terminated and no other proceedings shall be had or taken.

(g) Whenever the Commission determines that any officer, agent or employee of the City and County of San Francisco has engaged or is engaging in an unlawful employment practice it shall recommend appropriate action to the Mayor.

Section 9. Court Proceedings.

(a) If the Commission is unable to eliminate the discrimination charged, the Commission may, by a majority vote of all members certify the matter to the City Attorney for appropriate legal action to secure compliance with the provisions of this ordinance.

The Commission shall, at the time of certifying said matter, transmit to the City Attorney a copy of its recommendations in such case.

The City Attorney shall proceed in the name of the City and County, no less than twenty (20) and no more than forty (40) days thereafter, to invoke the aid of an appropriate court to secure compliance with the provisions of this ordinance. If the Commission prior to the commencement of the court proceedings as a result of its effort of adjustment or otherwise finds that the defendant is no longer engaged in unlawful practices and has complied with the recommendations of the Commission, no such proceedings shall be instituted.

(b) In any court proceedings instituted by the City Attorney the court shall hear and consider the matter as if it had never been before the Commission, and there shall be no presumptions in favor of any prior action of the Commission, nor shall there be any presumption against a

defendant arising out of his refusal to accept or comply with any recommendation of the Commission. In such cases the burden of proof shall be upon the City and County to establish by competent and substantial evidence that the defendent has violated the ordinance.

(c) No person shall be liable in damages or for any monetary judgment in excess of a sum equal to ninety (90) days' back pay, wages or earnings of the individual discriminated against. It shall be the duty of any individual discriminated against to minimize his loss or damage by attempting to secure other suitable employment, and the liability of the employer, labor organization or employment agency shall be reduced to the extent such individual has failed to minimize his damage.

(d) In every court proceeding instituted by the City Attorney to secure compliance with this ordinance, the defendant shall be entitled to a jury trial on the issue of damages or back pay, but the court, without a jury may make all other equitable orders pertaining to all other issues.

(e) Any employer who employs any individual pursuant to any formal or informal recommendation of the Commission, or pursuant to any order of the court rendered hereunder, may make adjustments in his work force so that such employment does not increase the number of his employees or require him to employ more persons than necessary.

Section 10. City Contracts.

In the event that two or more adverse court decisions are rendered in cases originating within a period of one (1) year whereby any employer, labor organization or employment agency is found by the court to have violated the provisions of this ordinance and where such employer, labor organization or employment agency has been guilty of deliberate, wilfull and persistent violations of this ordinance, the Commission shall after securing declaratory relief as hereinafter set forth certify such finding to the Mayor, whereupon the Mayor shall order all departments of this City and County not to enter into any contract with such employer, labor organization or employment agency for a period of one (1) year.

Before making such a finding the Commission by appropriate action for declaratory relief brought in the name of the City and County of San Francisco by the City Attorney must obtain from the Superior Court a declaration that such employer, labor organization or employment agency has been guilty of such deliberate, wilful and persistent violations of this ordinance as to entitle the Commission to certify such findings to the Mayor.

Section 11. No Duplication of Remedies.

The rights and remedies herein granted by the provisions of this ordinance to a person aggrieved are deemed to be entirely adequate and this ordinance and the provisions thereof shall not be construed as granting to an aggrieved individual any right to pursue a civil action in addition to, or in place of, the remedies enumerated in this ordinance.

Section 12. Severability.

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons and circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

Section 13. Repeal.

Any ordinance or part of any ordinance conflicting with the provisions of this ordinance be and the same is hereby repealed so far as the same affects this ordinance.

I hereby certify that the foregoing ordinance was read for the second time and finally passed by the Board of Supervisors of the City and County of San Francisco at its meeting of July 8, 1957.

John R. McGrath, Clerk.

Approved, July 10, 1957,

George Christopher, Mayor.

EMPLOYMENT
Fair Employment Laws—Indiana

The city of East Chicago, Indiana, has amended its Fair Employment Practices Ordinance, on June 10, 1957, so as to increase the membership of the Fair Employment Commission and to give the Commission additional investigative and enforcement authority.

WHEREAS, the Fair Employment Practice Ordinance No. 2526 as amended prohibits discrimination in employment because of race, color, religious creed, national origin or ancestry and creates a Fair Employment Practice Commission and provides for its administration and duties and provides penalties for violations; and

WHEREAS, it is deemed necessary and advisable by the commission to further amend said ordinance; now, threfore,

BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF EAST CHICAGO, INDIANA

Section 1. The Fair Employment Practice Ordinance No. 2526, heretofore adopted by the Common Council, shall be amended as follows:

Section 5. (Administration) is hereby amended by increasing the membership of the Fair Employment Commission from nine (9) to eleven (11) members; the two additional members also to be appointed by the mayor for four year terms. Six members shall constitute a quorum.

Section 6. (Powers and Duties) is hereby amended by the following additions:
(g) Receive and may investigate complaints and alleged violations of the laws of the State of Indiana dealing with public accommodations occurring in the City of East Chicago and upon finding a violation thereof, after efforts at conciliation shall have failed, shall certify the same to the City Attorney for reporting the same to the proper authorities charged with the duty of enforcing the laws of the State of Indiana.
(h) Receive and may investigate complaints of, and may initiate its own investigation of, practices of discrimination or segregation against any person because of race, religious creed, color, national origin or ancestry. It may hold public hearings for such purposes and make public its findings.
(i) Administer all statutes and ordinances prohibiting discrimination or segregation against persons because of race, religious creed, color, national origin or ancestry, and shall certify violations to the City Attorney for prosecution or reporting the same to the proper authorities charged with the duty of enforcing the laws of the State of Indiana.

EMPLOYMENT
NAACP Members—South Carolina

Act No. 223 (H.R. 1462) of the General Assembly of South Carolina, approved April 24, 1957, repeals Act No. 741 of 1956 (1 Race Rel. L. Rep. 751). Act No. 741, 1956, had made it unlawful for the state or any school district to employ a member of the National Association for the Advancement of Colored People. Act No. 741 had been the basis of a suit brought by Negro school teachers in a federal district court in South Carolina (*Bryan v. Austin*, 2 Race Rel. L. Rep. 378 [E.D. S.C. 1957]) which, on appeal to the United States Supreme Court, had been dismissed as moot because of the repeal of the act (see p. 777). The new act, however, requires all state and local officers and school authorities to require written applications for employment which must include information as to the applicant's affiliation or membership in associations and organizations.

An Act To Authorize State, County, And Municipal Officers, Departments, Boards And Commissions, And All School Districts, To Require Written Applications For Employ-

ment And To Prescribe The Form Thereof, And To Repeal Act No. 741 Of The Acts Of 1956.

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. State, county, and municipal officers, departments, boards and commissions, and all school districts in this State, shall require applications in writing for employment by them, upon such application forms as they may severally prescribe, which shall include information as to active or honorary membership in or affiliation with all membership associations and organizations.

Section 2. The provisions of this act shall not apply to any office or position which by law is filled by the vote of the qualified electors in any general or special election.

Section 3. Act No. 741 of the Acts and Joint Resolutions of the General Assembly of the State of South Carolina in the Regular 1956 Session, and also all other acts or parts of acts inconsistent with the provisions of this act are repealed.

Section 4. This act shall take effect upon approval by the Governor.

CONSTITUTIONAL LAW
Interposition and Nullification—Virginia

The 1956 General Assembly of Virginia adopted a resolution of interposition (1 Race Rel. L. Rep. 445). Following the adoption of the resolution, the state senate directed its Committee for Courts of Justice to prepare a report covering the history and application of the doctrine of interposition. The report has been filed, together with a minority report and a dissent. The Introduction and Table of Appendices to the report, reproduced below, indicate the scope and content of the report.

INTRODUCTION

On February 1, 1956, the General Assembly of Virginia adopted a Resolution "interposing the sovereignty of Virginia against encroachment upon the reserved powers of this State, and appealing to sister States to resolve a question of contested power."

This Resolution was carried by a vote of 36-2 in the State Senate of Virginia, and by a vote of 90-5 in the House of Delegates.

Subsequent to the adoption of the Resolution, the Senate, recognizing a widespread interest in the issue of "States' Rights" thus revived, instructed its Committee for Courts of Justice to prepare a Report covering the history and application of the doctrine of interposition. Senate Resolution 14 directs the committee also to include in its Report "such statistical and narrative material, dealing with the public schools of Virginia and the problems attendant upon compulsory integration of the races therein, as shall, in the committee's opinion, be calculated best to inform sister States and the public generally of the school problem before us."

It is this report which follows.

* * *

Part II

APPENDIX

1. The Virginia Resolution of 1798
2. The First Kentucky Resolution of 1798
3. The Second Kentucky Resolution of 1799
4. Table of Appropriations for Public Schools, 1938-1958
5. Number of White and Negro Teachers, 1955-1956
6. Aggregate Salaries for White and Negro Teachers, 1955-1956
7. Comparative Size of Classes, White and Negro Schools
8. The Essential High School Content Battery
9. The Iowa Silent Reading Test
10. Table of School Enrollment in Virginia
11. Recent School Buildings for Negroes in Virginia
12. Table of Illegitimacy in Virginia, 1934-56
13. Jail and Penitentiary Commitments in Virginia, 1954-55

* * *

LITIGATION
Barratry—South Carolina

Act No. 25 (S. 25) of the General Assembly of South Carolina, approved on February 8, 1957, defines the crime of barratry as the soliciting or inciting of litigation and provides penalties for such a crime.

An Act To Define The Crime Of Barratry And To Provide Penalties For The Commission Thereof.

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. Any person who shall willfully solicit or incite another to bring, prosecute or maintain an action, at law or in equity, in any court having jurisdiction within this State, and who:

(a) thereby seeks to obtain employment for himself or for another to prosecute or defend such action, or
(b) has no direct and substantial interest in the relief thereby sought, or
(c) does so with intent to distress or harass any party to such action, or
(d) directly or indirectly pays or promises to pay any money or other thing of value to, or the obligations of, any party to such an action, or
(e) directly or indirectly pays or promises to pay any money or other thing of value to any other person to bring about the prosecution or maintenance of such an action or

any person who shall wilfully bring, prosecute or maintain an action, at law or in equity, in any court having jurisdiction within this State and who:

(1) has no direct or substantial interest in the relief thereby sought, or
(2) thereby seeks to defraud or mislead the court, or
(3) brings such action with intent to distress or harass any party thereto, or
(4) directly or indirectly receives any money or other thing of value to induce the bringing of such action, shall be guilty of the crime of barratry.

Section 2. Any person convicted of barratry shall be forever barred from practicing law in this State.

Section 3. As used in Section 1 of this act, the term "person" shall include corporations and unincorporated associations and the statutes and laws of this State pertaining to criminal liability and enforcement thereof against corporations shall apply to any unincorporated association convicted of barratry.

Section 4. Any corporation or unincorporated association found guilty of the crime of barratry shall be forever barred from doing any business or carrying on any activity within this State, and in the case of a corporation, its Charter or Certificate of Domestication, shall be summarily revoked by the Secretary of State.

Section 5. The crime of barratry shall be punishable by a fine of not more than $5,000.00 or by imprisonment of not more than two (2) years, or both.

Section 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 7. The provisions of this act are cumulative and shall not be construed as repealing any existing statute or the common laws of this State with respect to the subject matter of any of the provisions hereof.

Section 8. This act shall take effect upon its approval by the Governor.

CIVIL DISTURBANCES
Emergency Powers—South Carolina

Act No. 349 (S. 197) of the General Assembly of South Carolina, approved on June 15, 1957, confers additional powers upon the governor to provide for the protection of persons or property from violence or threats of violence. The act provides for a proclamation of an emergency by the governor and authorizes him to utilize the military forces or other law enforcement forces to maintain or restore order.

An Act To Confer Additional Powers Upon The Governor For The Protection Of Persons And Property And To Provide For The Enforcement Thereof.

Whereas, the State of South Carolina through its constitutional officers, under the Constitution, the statutory law and police power of the State, may control violence or threatened violence against persons and property; and

Whereas, this State has the dominant interest in and is the natural guardian of the public against violence and is empowered under the general sovereign authority of the State to prevent violence or threats of violence. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. The Governor is hereby authorized and empowered to take such measures and to do all and every act and thing which he may deem necessary in order to prevent violence or threats of violence to the person or property of citizens of the State and to maintain peace, tranquility and good order in the State, and in any political subdivision thereof, and in any particular area of the State of South Carolina designated by him.

Section 2. The Governor, when in his opinion the facts warrant, shall, by proclamation, declare that, because of unlawful assemblage, violence or threats of violence, a danger exists to the person or property of any citizen and that the peace and tranquility of the State of South Carolina, or any political subdivision thereof, or any particular area of the State designated by him, is threatened, and because thereof an emergency, with reference to such threats and danger, exists. In all such cases when the Governor shall issue his proclamation as herein provided he is hereby further authorized and empowered to cope with such threats and danger, to order and direct any person, corporation, association or group of persons to do any act which would in his opinion prevent or minimize danger to life, limb or property, or prevent a breach of the peace; and he may order any person, corporation, association or group of persons to refrain from doing any act or thing which would, in his opinion, endanger life, limb or property, or cause, or tend to cause, a breach of the peace, or endanger the peace and good order of the State or any section or community thereof, and shall have full power by use of all appropriate available means to enforce such order or proclamation.

Section 3. The Governor, upon the issuance of a proclamation as provided for in Section 2 hereof, shall forthwith file such proclamation in the office of the Secretary of State, which proclamation shall be effective upon issuance and remain in full force and effect until revoked by the Governor, and for the purposes already stated he is hereby authorized and empowered to take and exercise any or all of the following actions:

(a) Call out the military forces of the State (State Militia) or any unit or units thereof and order and direct them to take such action as in his judgment may be necessary to avert any threatened danger and to maintain peace and good order.

(b) Order any and all law enforcement officers of the State or any of its subdivisions to do whatever may be deemed necessary to maintain peace and good order.

(c) Order the discontinuance of any transportation or other public facilities, or, in the alternative, to direct that such facilities be operated by a State agency.

(d) Authorize, order or direct any state, county, or city official to enforce the provisions of such proclamation in the courts of the State by injunction, mandamus, or other appropriate legal action.

Section 4. The Governor is hereby authorized and empowered to intervene in any situation where there exists violence, or threats of violence to persons or property and take complete control

thereof to prevent violence, riotous conduct, public disorder or breaches of the peace.

Section 5. The powers herein granted are supplemental to and in aid of powers now vested in the Governor under the Constitution, statutory laws and police powers of the State.

Section 6. If any provisions of this act or the application thereof to any person or circumstances is held invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 7. This act shall take effect upon approval by the Governor.

MUNICIPALITIES
Boundaries—Alabama

Act No. 140 of the 1957 session of the Alabama Legislature, passed on July 15, 1957, rearranges the boundaries of the city of Tuskegee, Alabama. Although not so stated in the act, press reports indicate the purpose of the act as expressed by the legislator introducing it is to remove from the corporate limits a majority of the registered Negro voters of the city.

ACT NO. 140
S. 291—Engelhardt

AN ACT to alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and re-defined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries:

Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama; thence South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes East, 1049.3 feet; thence South 30 degrees 48 minutes East, 50.0 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 degrees 51 minutes East, 300.0 feet; thence South 47 degrees 00 minutes West, 1199.5 feet; thence South 64 degrees 09 minutes East, 1422.0 feet; thence South 24 degrees 13 minutes East 488.7 feet; thence South 73 degrees 25 minutes West, 370.8 feet; thence North 79 degrees 25 minutes West, 2285.3 feet; thence South 61 degrees 26 minutes West, 1232.6 feet; thence South 41 degrees 03 minutes East 792.3 feet; thence South 12 degrees 03 minutes East, 842.2 feet; thence North 88 degrees 09 minutes East, 4403.6 feet; thence South 0 degrees 15 minutes West, 6008.2 feet; thence North 89 degrees 59 minutes West, 4140.2 feet; thence North 34 degrees 46 minutes West, 6668.7 feet; thence North 35 degrees 00 minutes West, 380.4 feet; thence North 16 degrees 55 minutes West, 377.2 feet; thence North 54 degrees 29 minutes East, 497.8 feet; thence North 35 degrees 02 minutes West, 717.5 feet; thence South 54 degrees 03 minutes West, 1241.9 feet; thence North 36 degrees 09 minutes West, 858.4 feet; thence North 44 degrees 28 minutes East 452.2 feet; thence North 22 degrees 33 minutes East, 4305.9 feet; thence North 86 degrees 43 minutes East, 236.3 feet to the point of beginning.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This bill became an Act on July 15, 1957 without approval by the Governor.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 15 day of July, 1957.

J. E. SPEIGHT,
Secretary of Senate.

LEGISLATION
Coordinating Committee—Alabama

Act No. 119 of the 1957 session of the Alabama legislature, approved July 12, 1957, provides for the establishment of a co-ordinating committee in the state legislature to consider proposed bills relating to the maintenance of peace and order, the exercise of police powers, the operation of public schools and other related matters.

ACT NO. 119
H. J. R. 36—Kaul

BE IT RESOLVED by the House of Representatives, the Senate concurring, that:

WHEREAS, there have been introduced a number of bills in both houses of the legislature, a large number of which have overlapping and possibly conflicting provisions, particularly concerning the operation of the public school system, the exercise of the police power of the state, counties and municipalities, the registration of voters, and other matters of general importance, and

WHEREAS, the convenience of persons interested in such legislation in presenting their views theron, and the orderly and expeditious consideration of such proposed legislation by the regular constituted committees and by the legislature would be facilitated by a joint committee of both houses created to review, consider, and coordinate such bills and resolutions.

THEREFORE, BE IT RESOLVED THAT:

1. The Speaker of the House and the President of the Senate respectively appoint 7 members of the Senate to serve as a Coordinating Committee of the Legislature;

2. There shall be sent to the Coordinating Committee for its recommendations by the chairmen of the regular standing committees to which bills and resolutions have been referred, copies of all bills and resolutions dealing with the maintenance of peace and order of the state or any community, the exercise by the state or any county or municipality of its police power, the operation of public schools, and other related matters deemed to be suitable for the consideration and recommendations of said committee;

3. Said Coordinating Committee shall meet at such times, places, and manner as it may determine to consider, coordinate and make recommendations with respect to bills and resolutions of both houses which may be sent to it;

4. Standing committees defer public hearings or other action upon bills or resolutions referred to them while the same are before the Coordinating Committee for its recommendations.

5. The Clerk of the House and the Secretary of the Senate are requested to provide the Committee with the necessary clerical assistance.

Approved July 12, 1957.
Time: 12:13 P. M.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 15 day of July, 1957.

OAKLEY MELTON, JR.,
Clerk of the House.

ADMINISTRATIVE AGENCIES

EDUCATION
Public Schools—Tennessee

White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking to require the city board of education to admit children to public schools in the city without regard to race or color. A motion to constitute a three-judge court was granted. The court determined that it did not have jurisdiction, the invalidity of Tennessee constitutional and statutory provisions requiring racially separate schools being conceded by the defendants, and remanded the case to a single judge court. The court further found that the board of education was proceeding in good faith toward eliminating segregation in the schools and granted a continuance to the next term of court. *Kelley v. Board of Education of Nashville,* 139 F.Supp. 578, 1 Race Rel. L. Rep. 519 (M.D. Tenn. 1956). Later a motion to intervene in the case by members of the Tennessee Federation for Constitutional Government was denied by the court. 1 Race Rel. L. Rep. 1042 (1956). On October 29, 1956, the board of education adopted a plan providing for the elimination of compulsory segregation in the first grade beginning with the 1957-58 school year with a limited right of transfer on the basis of the racial composition of the school attended and setting a date for further consideration of the time and extent of additional integration. 1 Race Rel. L. Rep. 1120. This plan was submitted to the court on further hearing of the action for an injunction. The court approved the plan in part as being a prompt and reasonable start toward complete integration but directed the board to submit, before December 31, 1957 ,"a report setting forth a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor." 2 Race Rel. L. Rep. 21 (1957). Upon the announcement by the board of a redistricting plan to implement the integration of the first grade, certain persons petitioned the board to seek to use other means, particularly recently enacted Tennessee statutes (2 Race Rel. L. Rep. 215, *et seq.*), to prevent integration. The board requested an opinion of its attorneys. The opinion, advising the board to proceed with its plan, follows:

July 16, 1957

Mr. W. A. Bass, Superintendent
Nashville City Schools
Nashville, Tennessee

Dear Mr. Bass:

Your letter of July 15th, written at the request of the Nashville Board of Education, through its Chairman Mr. Elmer Pettit, requests our opinion with respect to the matters herein set forth. At the meeting of the Board of Education on July 11, 1957, certain individuals appeared before the Board and protested the plan to abolish compulsory segregation in the First Grade in the Fall of 1957, which has heretofore been submitted to the Federal Court, approved by such Court and included in its judgment.

Such protests may be summarized in the following quotations—one from Mr. L. V. DuBose, and the other from Dr. Clyde Alley. Mr. DuBose said that those speaking for the Tennessee Federation for Constitutional Government "deny the validity of the May 17th, 1954 decree of the U.S. Supreme Court". Dr. Alley said "we ask you to use the laws passed by the 1957 Tennessee State Legislature and provide us with all white schools, and with all negro schools."

To the extent that there is a request embodied in the protests, it is that this Board now abandon its plan to abolish compulsory segregation and declare that because of laws adopted by the Tennessee Legislature in 1957 this Board is no longer under legal obligation to comply with the decision of the Supreme Court of the United

States. Whether those protesting asked the Board to take such action after submitting a revised plan to the Federal Court, or without such submission, is not clear, and what substitute plan, if any, they wish this Board to submit to the Federal Court is also not clear.

[*Review of Events*]

Before giving specific answer to the inquiry, it is proper that we review the events which have preceded the protests now under consideration.

In May 1955 the Federal Supreme Court affirmed decisions first announced by it in 1954 that compulsory racial segregation in public schools in unconstitutional and that a state may not deny to any person on account of race the right to attend any school that it maintains. A few weeks subsequent to these decisions, certain Negroes, who are parents of children attending the Nashville schools, demanded that their children be permitted to attend the school nearest their respective homes, despite the fact that such schools were then operated on a segregated basis for white students. A few white parents, teachers at Fisk University, made similar demands for the admission of their children to nearby colored schools.

This Board rejected such demands in order that the matter of abolishing compulsory segregation might be adequately studied and properly planned. Then in the Fall of 1955, a law suit was filed with the members of this Board and others as defendants, which asked the Federal Court by injunctive process to prevent the maintenance of compulsory segregation.

When this suit was first reached for trial, the undersigned, having been employed as attorneys to represent the Board after the litigation began, requested that the hearing be continued until the next term of Court, approximately six months later. A continuance was sought in order to give this Board more time to make and present its plan for obeying the decision of the Supreme Court. The attorneys who had brought the suit, selected by the N.A.A.C.P., vigorously opposed our motion for a continuance, but our motion was granted by a three judge Federal Court which heard the case.

Certain individuals, now officers and representatives of the Tennessee Federation for Constitutional Government, believed that this Board and the attorneys retained to represent it, were not properly defending the case and so stating in their petition filed in Federal Court, they sought to intervene. Although their motion to intervene was not opposed by attorneys for this Board, the Federal Judge summarily rejected such effort, saying:

> "this Court has no reason whatever to believe that the Board of Education and its attorneys are not representing the best interests of the people of Nashville to the best of their ability. And I think the fact that the Board of Education is doing so has been demonstrated by the manner in which the case has been handled by the attorneys for the Board up to this point, indicating very careful attention to the case and consideration of all questions involved."

In the Fall of 1956 the case in Federal Court was called in order to be set for hearing. The attorneys for this Board requested the Court to postpone the hearing date to a time subsequent to the adjournment of the 1957 Legislature in order that any laws then enacted might be taken into consideration by the Board in making its plans, and by the Court in its judgment and decree. Expressing the opinion that such prospective laws could not affect or diminish the constitutional obligation of the defendants, including this Board, to abolish compulsory segregation, the Court denied our request and set the case for hearing in November 1956.

[*Alternative Noted*]

This Board recognized the obvious fact that the only alternative to the adoption by it of a plan for gradual desegregation was a judicial order for abrupt, possibly immediate, desegregation, and it submitted its plan to the Court at such hearing. The plan submitted proposed to abolish compulsory segregation in the First Grade in the Fall of 1957, and to take further steps as experience and circumstances might justify.

This plan was vigorously challenged by plaintiffs and their attorneys of the N.A.A.C.P. as inadequate and dilatory. By the presentation of evidence, by oral argument and by two written briefs, they urged the Court to reject the plan and to order total and abrupt desegregation. Counsel for this Board supported the plan with evidence at the hearing and by brief and oral argument. The Federal Court approved the challenged plan, holding that it was a reasonable first step and that this Board was acting in good

faith. In approving the first step, the Court ordered that this Board "submit to the Court not later than December 31, 1957 a report setting forth a complete plan to abolish segregation in all the remaining grades."

The judgment of the Federal Court (1) approved the plan submitted, (2) recognized and declared the right of the plaintiffs and others similarly situated to attend the public schools of Nashville without discrimination on account of race, (3) withheld the issuance of an injunction and (4) retained jurisdiction of the action.

[*Improper Action*]

Any action by this Board now which abandoned such plan without prior approval of the contemplated action by Federal Court would be improper and probably contemptuous of the Court. One obvious consequence of such abandonment would be the almost immediate issuance of an injunction compelling the enforcement of the submitted plan. A likely consequence would be an order for immediate and total desegregation because the Board would not be operating under its plan, and the Federal Court has already adjudged that "it is not the duty of the Court to devise a plan of desegregation."

The only remaining questions are whether the Board should formulate and present to the Federal Court for approval a revised plan based on laws adopted by the Tennessee Legislature in 1957 and whether there is any reasonable prospect that a revised plan would receive Court approval.

The only action suggested by those making the protest is that this Board should abandon its plan approved by the Court. Apparently they ask that the Board say to the Court, if it say anything, that the Board is no longer under legal obligation to abolish compulsory segregation because the Tennessee Legislature recently adopted a law permitting the assignment of pupils on consideration of non-racial factors.

Chapter 13 of the Public Acts of 1957 authorizes Boards of Education to assign students to particular schools. Such Act may be useful in solving some of the problems created by the abolishing of compulsory segregation. It may be assumed for present purposes that such law is constitutional if construed as doing what it purports to do, i.e. to authorize assignment of pupils on the basis of non-racial factors.

This Board has not declared that it will make no use of the Tennessee pupil assignment law in the performance of its functions. When occasion arises, presumably it will make such use. In its plan heretofore adopted, submitted to Court and approved as to legality, one of the most important provisions is that which states that applications for transfers will be carefully considered and granted for good cause when practicable. Thus, the plan of this Board, approved as to legality by the Federal Court, contemplates a liberal transfer and assignment policy, and in this respect Chapter 13 makes explicit that which was previously implicit—the power of boards of education to assign students.

In the light of what has happened to the pupil assignment elsewhere, it will not be easy to sustain the constitutionality of the Tennessee Act when challenged. There is no more certain way to assure that this Act will be quickly held unconstitutional and rendered useless to this and other Boards of Education than for this Board of Education, already a defendant in litigation, to announce such law will be used to maintain compulsory segregation. So construed, the Act would be so clearly unconstitutional that this Board would have no reasonable prospect of securing approval by the Federal Court for abandoning its plan heretofore made the judgment of the Court.

[*Previous Opinion*]

In an opinion under date of May 10, 1957, we also referred to Chapter 11 of the Public Acts of 1957, which authorizes a Board of Education to continue to operate schools on a segregated basis where no student is compulsorily segregated or compelled to attend a school outside his own school zone. This Act does not purport to require school boards to provide separate schools, but it authorizes such action when it can be taken on a voluntary basis. Again, there is a law which offers no prospect for securing an order from the Federal Court that the constitutional obligation of this Board to abolish compulsory segregation has been changed.

Those filing the protests attack counsel representing this Board as endeavoring to determine its policy. This is a mistake. We have consistently limited our function to representation of the Board as a client in a pending lawsuit. The few meetings of the Board which we attended were by specific invitation. Opinions to the Board, such as this one, have been in re-

sponse to express requests. Before we had any connection with the controversy, the Board had recognized its obligation to obey the Constitution of the United States, as interpreted by the Supreme Court, and nevertheless had been made defendant in a desegregation suit. Always conscious of its sole right and duty to make policy in this matter, the Board has fully discharged its obligation to the people of Nashville in this regard.

[*Embodied in Answer*]

The recognition by this Board of its constitutional obligation was embodied in the answer filed on its behalf in Federal Court in 1955. It was on the basis of such recognition that time and delay have heretofore been secured. It was on the basis of such recognition that a plan for abolishing compulsory segregation gradually rather than immediately and abruptly was approved by the Court. If the Board chooses to prepare any modification in its plan we will, upon request of the Board, submit the same to Federal Court for approval.

In conclusion and responding to the specific request for opinion, we advise (1) that under the circumstances heretofore reviewed it would be very improper for this Board, without prior approval by the Federal Court and consequent modification of its judgment, to abandon its plan for abolishing compulsory segregation in the First Grade, and (2) that there is no real possibility the Federal Court will approve an abandonment of the plan heretofore submitted by sustaining the constitutionality of the Tennessee pupil placement law construed as giving boards of education unlimited discretion to transfer on racial grounds, and then holding that recently enacted laws relieve this Board of its obligation under the Supreme Court decision to abolish compulsory segregation.

Mr. Reber Boult, to whom your inquiry was also addressed, joins in this opinion.

The papers which accompanied your letter are returned herewith.

Yours very truly,
Edwin F. Hunt

EMPLOYMENT
Fair Employment Laws—Minnesota

The Minnesota State Fair Employment Practices Commission has adopted, effective October 6, 1956, rules of practice for hearings before the board of review panel provided for by the state act.

RULES OF PRACTICE FOR HEARINGS BEFORE THE BOARD OF REVIEW UNDER THE MINNESOTA STATE FAIR EMPLOYMENT PRACTICES LAW

Adopted after public hearing held August 20, 1956, in accordance with and pursuant to Laws 1955, Chapter 516, Section 9, Sub-division 5, and Minnesota Statutes 1953, Chapter 15.

ARTICLE I

Definitions

Section 1. The term "initial complaint" means that complaint filed and issued pursuant to section 8 of the act.

Sec. 2. The term "complainant" means any person aggrieved by an alleged violation of the act who files, or in whose behalf by his attorney, agent, or the commission, is filed an "initial complaint".

Sec. 3. The term "complaint" means the complaint which pursuant to section 9 of the act is issued and served upon the respondent by the commission subsequent to the appointment of the board.

Sec. 4. The term "respondent" means the person charged in the complaint with having committed an unfair employment practice under the act.

Sec. 5. The term "act" means the Minnesota State Act for Fair Employment Practices, Laws 1955, Chapter 516.

Sec. 6. The term "board" means the three

persons appointed by the governor from the board of review panel to conduct a hearing in the case.

Sec. 7. The term "party" includes the complainant, respondent, and intervenor.

Sec. 8. The term "person" includes partnership, association, corporation, legal representative, trustee, trustee in bankruptcy, receiver, and the state and its departments, agencies, and political subdivisions.

Sec. 9. The term "commission" means the Minnesota State Fair Employment Practices Commmission.

ARTICLE II

Procedure

Section 1. *Service and filing of pleadings.*

Original and three copies of the complaint, notice of hearing, answer, and all other pleadings shall be filed with the board at the commission office in St. Paul, Minnesota, together with the original or certified copy of the return receipt proving service upon the other party or parties.

Sec. 2. *Complaint.*

(A) *Service*–Upon receipt of notification from the board of the time and place of the hearing to be held by the board, the commission shall file the original of the complaint and notice of hearing, together with three copies of the same, with the board at the commission office in St. Paul, Minnesota. The commission shall issue and serve by registered mail at least 20 days before the date of the hearing upon the respondent and complainant a copy of the complaint and written notice of hearing requiring the respondent to answer the allegations of the complaint at the hearing. The original or certified copy of the return receipt proving the service of said complaint and notice of hearing upon respondent and complainant shall be filed with the board at the commission office in St. Paul.

(B) *Form of complaint.*

(1) The complaint shall be in writing.

(C) *Contents*–A complaint shall contain the following:

(1) The full name and address of the complainant.

(2) The full name and address of the respondent.

(3) The specific charge of discrimination because of race, color, creed, religion or national origin, followed by a clear and concise statement of the facts which constitute the alleged unfair employment practice.

(4) The date or dates of the alleged unfair employment practice, and if the alleged unfair employment practice is of a continuing nature, the dates between which said continuing acts of discrimination are alleged to have occurred.

(5) A statement as to any action or proceeding instituted in any other form for the same unfair employment practice alleged in the complaint, together with a statement as to the disposition of such other action or proceeding.

(D) *Amendment of complaint*–A complaint, or any part thereof, may be fairly and reasonably amended as a matter of right at any time before hearing thereon, and, thereafter at the discretion of the board.

(E) *Withdrawal of complaint*–A complaint, or any part thereof, may be withdrawn only with the consent of the board and upon such conditions as it may deem proper.

Sec. 3. *Answer.*

(A) *When filed*–Within 15 days after receipt of the copy of the complaint and notice of hearing, the respondent shall serve by registered mail upon the commission and the complainant a verified copy of the answer, and serve and file with the board at the commission office in St. Paul, Minnesota, by registered mail, the verified original and three copies of the answer, together with the original or certified copy of the return receipt proving service of the answer upon the commission and complainant.

(B) *Extension of time for filing*–Extensions of time in which an answer is to be served and filed may be granted upon agreement between the commission and respondent, subject to the approval of the board.

(C) *Form of answer.*

(1) The answer shall be in writing, signed and verified by the respondent. The answer shall contain the postoffice

address of the respondent and his attorney or agent.

(2) The answer shall contain a general or specific denial of each and every allegation of the complaint controverted by the respondent, or a denial of any knowledge or information thereof sufficient to form a belief, and a statement of any matter constituting a defense.

(3) Any allegation in the complaint which is not denied or admitted in the answer, unless the respondent shall state in the answer that he is without knowledge, or information sufficient to form a belief, shall be deemed admitted.

(D) *Amendment of answer*—An answer, or any part thereof, may be fairly and reasonably amended as a matter of right at any time before hearing thereon, and thereafter at the discretion of the board.

(E) *Amendment of answer upon amendment of complaint*—In any case where a complaint has been amended, the respondent shall have an opportunity to amend his answer within such period as may be fixed by the board.

(F) *Defense and new matter*—Any allegation of new matter contained in the answer shall be deemed denied without the necessity for a reply.

(G) *Failure to file answer*—The board may proceed, notwithstanding any failure of the respondent to file an answer within the time provided herein, to hold a hearing at the time and place specified in the notice of hearing, and may make its findings of fact and enter its order upon the testimony taken at the hearing.

(H) *Opening of default*—Upon application, the board may, within 60 days of service of its order, or within such lesser time as the board may seek relief in the district court, upon good cause shown, open a default in answering.

Sec. 4. *Notice of hearing.*

(A) *Service*—Notice of hearing shall be filed with the board and served by registered mail, upon the respondent and complainant at least 20 days before the date of the hearing.

(B) *Contents.*

(1) The notice of hearing shall state the time and place of the hearing and require the respondent to answer the allegations of the complaint at the hearing.

(2) It shall inform the respondent that within 15 days after receipt of the copy of the complaint and notice, the respondent shall serve upon the commission and the complainant and file with the board, by registered mail, a verified answer to the complaint.

(3) The notice shall state that a failure to answer shall be deemed an admission of the allegations contained in the complaint and a default will thereupon be entered against respondent.

Sec. 5. *Hearings.*

(A) *Conduct of hearings.*

(1) The case in support of the complaint shall be presented before the board by the commission's attorney.

(2) The board shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, subject to the provisions of Laws 1955, Chapter 516, and to rule upon all objections.

(3) Majority vote—All rulings and determinations of the board shall be by majority vote.

(4) Continuation and adjournments—The board may continue a hearing from day to day or adjourn it to a later date or a different place by announcement thereof at the hearing or by appropriate notice.

(5) Stipulations—Stipulations may be introduced in evidence if signed by the person sought to be bound thereby or by his attorney at law.

(6) Motions and objections—Motions made during a hearing and objections with respect to the conduct of the hearing, including objections to the introduction of evidence, shall be stated orally and shall be included in the stenographic report of the hearing.

(7) Oral arguments and briefs—The board shall permit the parties to submit oral arguments before them and to file

briefs within such time limits as the board may determine. Oral arguments shall not be included in the stenographic report unless the board shall so direct.

(8) Improper conduct—The board may exclude from the hearing room any person who engages in improper conduct before it, except a party, his attorney, or a testifying witness.

(9) Public hearings—Hearings shall be public.

(10) Affidavits and depositions—Affidavits and depositions, duly and properly executed, may be received in evidence by the board.

(B) *Reopening of proceedings.*

(1) The board on its own motion may, whenever justice so requires, reopen any matter previously closed by it, upon 15 days' notice of such reopening being given to all parties.

(2) A complainant, respondent or intervenor, or the commission may, for good cause shown, apply for the reopening of a previously closed proceeding.

(3) Upon application duly made, the board, in its discretion, may, within 60 days of service of its order or within such lesser time as the commission may seek relief in the district court, reopen any matter previously closed where a decision was rendered upon the default of a party affected thereby.

(C) *Intervention*—Any person may, in the discretion of the board, be allowed to intervene in person, or by his attorney or agent, for such purposes and to such extent as the board shall determine.

Sec. 6. *Subpoenas.*

(A) *Issuance*—The board may issue subpoenas signed by any two members of the board compelling the attendance of witnesses or the production for examination of any books or papers relating to any matter under investigation or in question before the board on its own motion, or, upon the written application of any party to the proceeding. The issuance of such subpoenas on the motion of a party to the proceeding shall depend upon a showing of the necessity therefor.

(B) *Payment of fees*—Where a subpoena is issued upon the motion of a party to the proceeding other than the commission, the cost of service, witness and mileage fees shall be borne by the party at whose request the subpoena is issued. Where a subpoena is issued on the motion of the board or the commission, the cost of such service and witness and mileage fees shall be borne by the board or commission. Such witness and mileage fees shall be the same as are paid witnesses in the district courts of the state.

Sec. 7. *Depositions.*

(A) The board on its motion or on the written application of a party may, whenever necessary or required, and on not less than five days' notice, or such other terms and conditions as it may determine, take or cause to be taken depositions of witnesses residing within or without the state.

Sec. 8. *Findings, order, and opinion.*

(A) After hearing the matter the board shall make, issue and serve by registered mail findings of fact, conclusions of law and order.

(B) The board may in its discretion issue an opinion containing the reason for the findings, conclusions and order. Any member of the board may, in his discretion, file a concurring or dissenting opinion.

Sec. 9. *Amendment.*

(A) The rules of practice before the board shall be subject to amendment at any time, and a majority of the board of review panel may adopt, in accordance with Minnesota Statutes 1953, Chapter 15, additional rules whenever the same are deemed necessary for orderly procedure.

Sec. 10. *Liberal construction of rules*—These rules shall be liberally construed to accomplish the purposes of the Minnesota State Act for Fair Employment Practices.

Adopted by the Board of Review Panel August 20, 1956

/s/ Denzil A. Carty
/s/ Gustavus Loevinger
/s/ Amos S. Deinard
/s/ Barbara Stuhler
/s/ Stephen B. Humphrey
/s/ Mary Ann Jones
/s/ Thomas M. Champlin
/s/ Maurice W. Cohen
/s/ Ingwald M. Jacobson
/s/ Noah S. Rosenbloom
/s/ E. L. Prestemon
/s/ Alice P. Mayo

Approved as to form and legality:

MILES LORD, ATTORNEY GENERAL
By: /s/ Robert Latz
Special Assistant Attorney General

Date: September 5, 1956
Filed with the Secretary of State: September 5, 1956
Effective: October 6, 1956

EMPLOYMENT
Fair Employment Laws—New York

The Mayor of the City of New York promulgated Executive Order No. 41 on June 7, 1957. The order provides for the investigation of complaints of discrimination on the basis of race, creed, color, national origin or ancestry by any city department, agency or representative against any city employee. Investigations are to be conducted by the Commission on Intergroup Relations.

CITY OF NEW YORK
OFFICE OF THE MAYOR
New York 7, N. Y.

June 7, 1957

Executive Order No. 41

TO: Heads of all city departments and agencies

FROM: Robert F. Wagner, Mayor of the City of New York

SUBJECT: Prohibiting discrimination in employment, by city departments or agencies, against city employees because of race, religion or national origin

1. *Introduction*

It is the purpose of this Executive Order to assure and protect all employees of The City of New York against discrimination, based on race, creed, color, national origin or ancestry, in the recruitment, assignment, promotion or other aspects of employment by city departments or agencies.

2. *Statement of Policy*

a. There shall be no discrimination by any city department, agency, or official representative thereof against any employee of The City of New York because of race, creed, color, national origin or ancestry, or because of any complaint, grievance or appeal brought under the provisions of this order.

b. The Commission on Intergroup Relations shall receive and investigate all complaints and shall take such action thereon as it deems necessary and proper in accordance with the procedures established by the Commission pursuant to chapter 1 of the Administrative Code of the City of New York as amended by local law No. 55 adopted July first, 1955, and in accordance with the provisions and requirements provided therein.

3. *Complaint Procedure*

Any employee or group of employees of The City of New York, claiming to have been discriminated against because of race, creed, color, national origin or ancestry by any department, agency or official representative thereof, may file a complaint with The Commission on Intergroup Relations of The City of New York. The filing of a complaint, under this procedure, does not abridge the right of the complainant to file a complaint with the New York State Commission Against Discrimination.

a. *Form and Filing*:
The complaint shall be in writing. The original shall be signed by the complainant.

A complaint filed by a group of employees shall be signed by each person of such group. The original and two additional copies of the complaint shall be filed with the Commission on Intergroup Relations.

b. *Contents*:
A complaint shall contain the following:
1. The full name and address of each complainant, his Civil Service Title and salary grade.
2. The name of the department or agency, the office or unit where employed and the city officials involved.
3. A concise statement of the facts constituting the alleged discriminatory practice, policy or action.

c. *Time of Filing*:
The complaint shall be filed within six months after the alleged act of discrimination.

d. *Manner of Filing*:
The complaint may be filed by personal delivery, or by mail addressed to the office of the Commission on Intergroup Relations.

e. *Withdrawal of Complaint*:
A complaint or any part thereof may be withdrawn only with consent of the Commission on Intergroup Relations, and upon such conditions as it may deem proper.

Robert F. Wagner
Mayor

Statement of Mayor Robert F. Wagner accompanying Executive Order No. 41, dated June 7, 1957.

This Executive order is promulgated pursuant to the provisions of Local Law 55 (1955) which established the Commission on Intergroup Relations and empowered the Commission to receive and investigate complaints and to initiate its own investigations of discrimination against any person, group of persons, organizations, or groups, whether practiced by private persons, associations, groups, and, after consultation with the Mayor by city officials or city agencies.

My administration has always sought in every way to prevent any discrimination whatsoever, by any official or agency, against any employee of our city on the basis of race, color or creed. This executive order merely provides regular machinery whereby any city employee who may believe that his employment rights are conditioned in any way because of race, religion or national origin shall have the right and opportunity, formally, in accordance with established procedures, to seek adjustment within "the family" of city departments. The order therefore provides for appeals to the New York City Commission on Intergroup Relations and sets forth the procedure to be followed.

In effect, this executive order provides additional protections for the rights of employees of the City of New York.

EMPLOYMENT
Airlines—New York

Dorothy FRANKLIN v. TRANS WORLD AIRLINES, INC.

New York State Commission Against Discrimination, April 22, 1957, Case No. C-4403-56

SUMMARY: A Negro woman filed a complaint before the New York State Commission Against Discrimination alleging that she had been refused employment by Trans World Airlines, Inc., solely on the basis of race or color. In a preliminary investigation the Investi-

gating Commissioner found that probable cause existed to find that discrimination had been practiced. The case was then set for formal hearing. The preliminary report of the Investigating Commissioner follows:

DETERMINATION AFTER INVESTIGATION

On October 17, 1956, Dorothy Franklin, residing at 2-10 Astoria Boulevard, Queens, New York, made, signed and filed with the New York State Commission Against Discrimination a verified complaint against Trans World Airlines, Inc., respondent, wherein she charged, in substance, that respondent committed an unlawful discriminatory practice in that on or about September 7, 1956, complainant was refused employment as a flight hostess by respondent because of her color.

In accordance with Section 297 of the Law Against Discrimination, the Chairman duly designated me as the Investigating Commissioner to investigate said complaint.

Accordingly, I, with the assistance of the Commission's staff, investigated said complaint.

On April 12, 1957, the complaint was amended by the complainant to take account of various facts adduced during the course of the investigation.

[*Sought Employment*]

Complainant is twenty-one years of age, single, 5′ 6″ tall, weighs 125 pounds and is a Negro. For some time past, complainant has been desirous of obtaining employment as a flight hostess. In the latter part of August 1956, complainant was told by the Urban League that respondent had been advertising during the summer for flight hostesses. She was referred by the Urban League to respondent's personnel office, where on August 29, 1956 she applied for the position of flight hostess.

Complainant filled out and submitted an employment application form, underwent a physical examination by respondent's medical department and took a written intelligence test. Complainant was interviewed and told that she would hear from respondent in two or three weeks. On September 7, 1956, she received a letter informing her that respondent was not accepting her for employment.

Respondent is a Delaware corporation which is authorized to do business within the State of New York and is an employer within the meaning of the Law Against Discrimination.

[*Employs 1500 Hostesses*]

Respondent employs about 1500 flight hostesses and has a yearly turnover of about 500 in this job category.

At the time complainant applied for the position, respondent had flight hostess positions available.

When informed of the substance of the complaint, respondent conceded that complainant had passed the preliminary physical examination and the written intelligence test. Respondent contended that the only reason complainant was rejected was because of her appearance, that is, respondent claimed that complainant has a "poor complexion," "unattractive teeth" and legs that are "not shapely."

I, as Investigating Commissioner, and several members of the Commission's staff assigned to assist me, have on several occasions interviewed complainant and observed her appearance. We are unanimous in our opinion that respondent's objections to complainant's physical appearance are not factually accurate and cannot be accepted as valid reasons for her rejection.

Based upon the facts adduced in the course of my investigation, I am of the opinion that when complainant applied for the position of flight hostess with respondent she fully met all of the qualifications specified by respondent for the position of flight hostess viz., education, age, weight, height, appearance, health and being single. I believe that respondent's stated reason for not hiring complainant is merely a contrived excuse for the purpose of concealing respondent's true reason for her rejection, namely, her color.

[*Negro Never Employed*]

My conclusion with respect to the true reason for complainant's rejection is reinforced by the fact that respondent has never employed a Negro in any flight capacity, including that of flight hostess. This, despite the fact that during the past few years Negroes have applied to respondent for the position of flight hostess. From my investigation herein, I believe that respondent has maintained a policy of barring Negroes from employment as flight hostesses.

In view of the foregoing, I find that probable

cause exists to credit the allegations of the amended complaint that respondent committed an unlawful discriminatory practice, in that complainant was refused employment as a flight hostess because of her color. I will, therefore, in accordance with the provisions of Section 297 of the Law Against Discrimination, proceed to the conference and conciliation stage of the statutory procedure.

Dated: New York, New York
April 22, 1957.

J. Edward Conway
Investigating Commissioner

ATTORNEYS GENERAL

EDUCATION
Attorneys' Fees—Delaware

The Attorney General of Delaware was requested for an opinion as to the proper method of payment of fees of attorneys representing local school boards in "segregation" cases. The General Assembly had provided an appropriation for the payment of such expenses. The opinion outlines the proper functions of local boards in the payment of such fees, the determination of the amount to be paid and the procedures to be used.

STATE OF DELAWARE
OFFICE OF THE ATTORNEY GENERAL
WILMINGTON, DELAWARE

May 6, 1957

State Board of Education
Dover, Delaware

Gentlemen:

You have requested our opinion with respect to problems which have arisen concerning the payment of fees to attorneys representing local School Boards in the so-called segregation cases. Mr. Theisen's letter of March 29, 1957 has been considered. While his letter refers to a problem raised by bills for services submitted by one attorney, we believe this opinion may be more helpful if it refers generally to the principles and procedure which should govern the payment of these legal expenses.

For a variety of reasons, this office advised the local School Districts it would not represent them in regard to the segregation suits but would represent only the State Board of Education. The members of the Boards of the Districts sued engaged counsel. In order to provide funds for the payment of these counsel with respect to segregation matters, the General Assembly, by 50 Del. Laws, Chapter 643, made an appropriation for the year ending June 30, 1957 in the following language:

> ". . . State Board of Education
> To be allocated to school districts and special school districts incurring extraordinary legal expenses . . . $35,000.00."

The questions presented are:

(1) What is the respective function of the State Board of Education and the local School Board with regard to the employment of counsel and the determining of the amount of fees for legal services?
(2) What principles should govern in determining the proper amount to be paid for legal expenses?
(3) Procedures to be followed.

1. *The Respective Functions of the Boards*

The main object in construing Chapter 643 is to ascertain the intent of the Legislature. This is a difficult task because of the paucity of words used. Further, Chapter 643 must be considered in the light of the School Code, Title 14, Del. C., and all the circumstances concerning segregation problems.

While the State Board of Education has considerable direction and control under Title 14, Del. C., Chapter 7, with respect to non Special School Districts and somewhat less control and direction as to Special School Districts under Chapter 9, we do not conceive that the relationship between the State Board and the local School Districts, which generally prevails, wholly apply in the special circumstances involved. If the local School Districts employ counsel to represent them in matters where the Attorney General has declined to do so for special reasons, the State Board should defer as to the local Districts all questions with respect to the employment of counsel, which would

include the selection of counsel, the amount of compensation and other problems.

It would seem to follow that if the local Districts are the agencies to select counsel they would, in our opinion, be the proper agency to make arrangements with the counsel selected with respect to compensation to be paid.

That the primary responsibility for the selection and arranging of terms of employment of legal counsel is with the local District is supported by Chapter 643 above cited. The Chapter appropriates a sum to the State Board to be allocated by it to local Districts "incurring extraordinary legeal expenses". The word "incurring means to become liable for or subject to. See Webster's New International Dictionary, 2d Ed.; 20 Words and Phrases, Perm. Ed., page 622 et seq. The idea expressed is that it would be the local District which would become liable for the attorney's fees and legal expenses. The statutory liability of the local District for the legal expenses implies the right of selection and the concomitant right to make arrangements with respect to compensation.

The only difficulty presented by Chapter 643, is the provision requiring the State Board to make an allocation to the School Districts. The use of the words "to be allocated" connotes something more than blind payment of any bill for compensation which might be submitted. Words and Phrases, Perm. Ed., Vol. 3, page 336.

In our opinion the statute requires the State Board to exercise some judgment or supervision with respect to bills for legal expenses submitted. However, we are of the opinion that the discretion or supervision of the State Board should be within the limits of ascertaining if the local Board has acted in good faith in approving the amount for legal expenses and whether or not any palpable error appears in the application of the principles which should govern the local Board with respect to the payment of legal expenses.

With good faith and no palpable error appearing, the State Board should not attempt to substitute its judgment for that of the local Board.

2. *Determination of the Amount to be Paid*

With respect to the amount of compensation to be paid legal counsel, we assume that in each case the agreement between the local Board and legal counsel does not stipulate a precise amount the attorney is to receive for his services but is that the attorney will be entitled to what his services are reasonably and fairly worth under all the circumstances. It might be observed that this is quite often the arrangement existing between attorney and client, especially as here, it is difficult to know in advance, what services will be required.

The usual procedure in these instances is for the attorney to initially fix the fee for his services, transmit his bill and it is only where the client might have some question as to it that any problem would arise. The fixing of the amount of compensation for services is one of the most difficult tasks facing an attorney. The general principles to be used as a guide in these situations have been stated as follows:

> "Where authority exists for the employment of attorneys and agents, when the services are rendered the obligation of the municipality to pay therefor arises and, in the absence of agreement touching the sum to be paid, the reasonable value of the services may be recovered. However, the amount may be prescribed by law, or in the contract of employment, in which case it is controlling . . ." McQuillin-Municipal Corporations, 3rd Ed., Vol. 4, p. 111, § 12.199
>
> "The determination of this depends largely upon the circumstances of the particular case. Among other things to be considered are the importance and results of the case, the difficulties thereof, the degree of professional skill and ability required and exercised, the skill, experience, and professional standing of the attorney, and the prominence of character of the parties, where it affects the importance of the litigation, as well as the amount or values involved or recovered. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit, although in the absence of other evidence, the court must be guided in estimating the value of attorney's services by the time or amount of labor performed as indicated by the record."
> 5 Am. Jur., p. 380, § 198
>
> "An attorney is entitled to fees which are fair and just and will adequately compensate him for his services. In the absence of

an express agreement between him and his client, as to the amount of his compensation, an implied agreement arises with regard thereto, which stands on the same footing as like agreements between other parties, and accordingly it is a well-settled rule that, when an attorney renders services, upon request or employment, without any agreement as to his fee, he is entitled to a fair, just, and reasonable compensation, which is measured by the reasonable value of the services rendered to the client, and, according to the character and extent of the services rendered, . . ." 7 C. J. S., p. 1079, § 191

"In determining what is a reasonable attorney's fee or allowance for legal services rendered, many and varied elements or factors are to be considered. Among the principal elements or factors to be considered are the amount and character of the services rendered, the nature, and importance of the litigation or business in which the services were rendered, the degree of responsibility imposed on, or incurred by, the attorney, the amount of money or the value of the property affected by the controversy, or involved in the employment, the degree of professional ability, skill, and experience called for and exercised in the performance of the services, and the professional character, qualifications, and standing of the attorney, and also the amount recovered.

"The labor, time, and trouble involved and expended by the attorney, are also elements to be considered, although it has been held that the element of time is of minor importance, and standing alone is not a basis for compensation. Time, in this connection, means the length of time employed by the attorney in preparation for, and trial of, the case, and not the length of the time the litigation has been permitted to remain in court.

"The benefit or result secured for the client is also an important element to be considered in determining the value of an attorney's services, although other things besides material gain are involved; but, it has been held that prospective benefits cannot be considered for such purpose.

"Other facts that may be considered include the cost of the attorney's reasonable traveling expenses, the demand for his services by others, the expenses incurred in following the case from court to court, the overhead expenses of the attorney in maintaining his office, the reasonableness and regularity of the employment, the relationship between the parties, and whether the attorney has been otherwise compensated than by the allowance he may receive."
7 C. J. S., page 1080, § 191

There can be little question but that extremely difficult and complex problems are presented by the segregation matters. The change brought about by the application of the Constitutional principles involved affect not only the local Boards, but also the communities and the entire school system.

The attorney for the local Board must interpret the Constitutional principles and complex legal and procedural matters to their immediate client, the local School Board, and also to the citizens of the entire School District. This type of legal leadership requires a very high form of judgment, skill, learning, tact, courage and patience. One of the attorneys has stated the matter briefly by saying "These cases are difficult and unpleasant at the best,—". Adequate compensation under the circumstances is called for.

As the authorities above point out, mere time spent in the cases is only a minor consideration. The standing of counsel in the community is an important consideration as well as his wisdom, judgment and legal learning.

We are of the opinion the local Boards must consider all the factors involved in exercising their judgment, keeping in mind also the requirement of Chapter 643 that the expenses must be "necessary and essential". This also must necessarily mean the services must have been rendered.

3. *Procedures*

We are of the opinion that when the amount to be paid for legal services is satisfactory to the local School Board, it should pass a resolution stating the facts to bring the matter within the statute and the general law involved. A copy of this resolution should be sent to the State Board of Education. For convenience, we attach a form of resolution which should be followed in substance.

If we can be of further assistance, please let us know.

Very truly yours
Herbert L. Cobin
Chief Deputy Attorney General

FORM OF RESOLUTION

Resolved as follows:

That the bill of_____ for legal services and disbursements constitutes necessary, essential and extraordinary legal expenses rendered to this School District; that the amount thereof constitutes reasonable and fair compensation for services rendered; that this School District having incurred said expenses, a copy of this bill for expenses together with a certified copy of this resolution be forwarded to the State Board of Education; that the State Board of Education is requested to allocate to this Board sufficient moneys to pay said legal expenses.

It is hereby certified that the above is a true copy of a resolution adopted by the Board of Trustees (Education) of the_____ School District, on_____, 1957.

Secretary to the Board

(Seal)

GOVERNMENTAL FACILITIES

Parks, Cultural, and Recreational Facilities—North Carolina

The City Attorney of Durham, North Carolina, has furnished a memorandum to the city council concerning the use by Negroes of cultural and recreational facilities. The memorandum, dated June 17, 1957, points out some of the legal problems which may arise in connection with the use by Negroes of certain facilities which were acquired by the city under deeds which restrict the use to which the property may be put, particularly with reference to bi-racial use. The memorandum follows:

MEMORANDUM FROM CITY ATTORNEY ON SEGREGATION MATTERS

I was requested by the Council for an opinion as to the rights of Negroes in reference to the Carolina Theater, Durham Public Library, Forest Hills Park, and, informally, with reference to the use of the Long Meadow Park swimming pool by Negroes. Since the questions have been raised I believe it just as well to go into the general question of segregation in all facilities owned and operated by the City of Durham.

[*Lease of Theater*]

As to the Carolina Theater, the City has leased this property since 1937, by successive leases, the current lease expiring in 1961. In none of these leases is there any provision or reference whatever to the seating arrangements as to races or any provision relating to the obligation of the Lessee either to segregate or integrate patrons. These leases were all made after public hearings, notices of which were published in the newspapers and they were made in good faith as a bona fide business transaction with no thought or plan in mind to circumvent any law relating to segregation or integration of the races. I am of the opinion that what was said in connection with the Durham Athletic Park applies here, and that the City is not discriminating against its Negro citizens in connection with this theater, and if any discrimination is being practiced it is not the act or conduct of the City.

As you all already know, the "separate but equal" doctrine which has been in effect for a good many years has been declared by the United States Supreme Court and other Federal Courts to no longer be the law of the land, and that doctrine has been completely abrogated. Therefore, I must advise you that, in general, under the law as it has been declared by the United States Supreme Court to now exist, the public facilities owned and operated by the City of Durham may not be denied to Negro citizens on a discriminatory basis purely because of race.

[*Deeds to Property*]

However, there are some areas which, by virtue of the specific language contained in the deeds by which they were donated and conveyed

to the City, raise legal questions which are not so simple to answer. I have reference to the Forest Hills Park, Hillside Park, Whitted Playground, Long Meadow Park, and East End Park. In reference to these specific places, there seems to me to be a very important question, quite apart from the racial aspect as such. This is because the property was given and accepted for a specific purpose and now that the law may be changed so that the purpose may not be carried out, what is the resulting situation of the donee from a moral as well as a legal standpoint? With reference to these particular areas the following facts exist:

By deeds dated December 24, 1930, (27 years ago), Mr. and Mrs. John Sprunt Hill gave to City of Durham property known as Forest Hills Park and the property known as Hillside Park and Whitted Park. These two deeds were dated the same day and given to the city the same day. In the deed to the Forest Hills Park there is a provision which reads as follows:

> "TO HAVE AND TO HOLD, the above described land, together with all privileges and appurtenances unto the City of Durham, and its successors, PROVIDED, HOWEVER, that said property shall be forever used by the City of Durham and its successors as a golf course, or playground, or for park and recreational purposes, to be known as Forest Hills Park, for the *white people* of Durham County, under such rules and regulations as may from time to time be prescribed by the Governing Body of the City of Durham. In the event the City of Durham or its successors shall cease to use the above described property for the purposes hereinabove set forth for a period of *twelve months* said property *shall be sold* by the City of Durham or its successors and the proceeds of said sale given to such public charities as may be designated by the Governing Body of the City of Durham or its successors".

In the deed for Hillside Park and Whitted Playground the provision is the same as that quoted as to Forest Hills Park, except in this deed the Park was to be known as Hillside Park and was for the *colored people* in Durham County, and there is the further provision in this deed that in the event the City of Durham or its successors shall cease to use said property for the purposes set forth for a period of *twelve months*, the property *shall be sold* by the City and the proceeds used in the same way as provided with respect to Forest Hills property.

Later, in March 1932 Mr. and Mrs. Hill gave two more deeds to the City, one for Long Meadow Park and the other for East End Park. The Long Meadow Park deed contained a provision to the effect that it shall be forever used "as a playground or for park and recreational purposes to be known as Long Meadow Park, for the *white people* of Durham County, under such rules and regulations as may from time to time be prescribed by the Governing Body of the City of Durham. In the event the City of Durham or its successors, shall cease to use the above described property for the purposes hereinbefore set forth for a period of *three years*, the City of Durham, or its successors, are hereby *authorized and empowered to sell* any part or all of the above mentioned land, and to donate the proceeds from sale of said land to such public charities as may be designated by the Governing Body of the City of Durham, or its successors". The deed given on the same date for the East End Park contains the same restriction as is in the Long Meadow Park deed, except this Park is to be known as East End Park for the *colored people* of Durham County; and the deed contains the same provision with reference to ceasing to use the property for such purposes for three years authorizes and empowers the City to sell it.

The deeds made in 1930 and 1932 by Mr. and Mrs. Hill to the City, containing the restrictions and conditions above mentioned, were accepted by the City upon the terms specifically expressed in those deeds, and for the past 25 to 27 years the lands have been used for the purposes set forth in these deeds.

[*Effect of Deeds*]

It is my opinion that, although the "separate but equal" doctrine was the law when these deeds were made, the Court would probably decide at this time that these restrictions are no longer valid insofar as the City of Durham is concerned. This would raise the question as to whether the remaining portion of the deeds, i.e., *shall* be sold and *authorized and empowered to sell*, respectively, would also be invalid, or whether the Court would hold that since the restrictions expressed in the deeds were legally invalid and, therefore, incapable of being carried

out such situation would automatically require the City to sell Forest Hills, Hillside, and Whitted properties and would automatically authorize and empower the City to sell the Long Meadow and East End Park properties.

Or, even though the provisions as to the use by white citizens or by colored citizens, respectively, may not be carried out by the City because it would be "state action" contrary to the decision of the United States Supreme Court in the Girard case which was decided in April 1957, there is a serious question as to whether those deeds did not convey the land to the City *in trust* to be used for the specific purposes therein set forth, in which event the City of Durham would be a Trustee; and in such case, if the City as Trustee cannot carry out the trust because it is a public body, does the trust necessarily fail? If, in law, the City as Trustee may it not resign and submit the matter to a Court of equity for the appointment of another Trustee who has the legal capacity to carry out the terms of the trust as set forth in these deeds?

[*Girard College Case*]

On this point, let me refer to certain language recently used by the Supreme Court of Pennsylvania in considering the Girard College case. In that case Stephen Girard by Will probated in 1831 left a fund in trust for the erection, maintenance, and operation of a college which was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain". The Will named the City of Philadelphia as Trustee. The college was opened in 1848 and the provisions of the Will carried out. In February 1954, the Petitioners, Foust and Felder, applied for admission to the College. They met all qualifications, except they were Negroes. For this reason the Board refused to admit them. The case was instituted and finally decided by the United States Supreme Court on April 29, 1957. Its decision was that the acts of the City of Philadelphia and the Board, even as Trustee, constituted state action, and since there was discrimination it was forbidden by the Fourteenth Amendment. The United States Supreme Court did not, however, comment upon or decide the point mentioned by the Supreme Court of Pennsylvania in its decision in the following language:

"But finally, even if the Board of Directors of the City Trusts were deemed to be engaged in 'state action' in the administration of the Girard trust,—petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee. It is hornbook law, pronounced over and over again by the decisions of this Court and presumably by those of all other jurisdictions, that, as stated in Girard v. City of Philadelphia, 7 Wall 1, 13, 74 U.S. 1, 13, 19 L.Ed. 53: 'Now, if this were true (that the City could not act as trustee) the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee.' Already in the first attack on the trust the Supreme Court in Vidal v. Girard's Executors, 2 How. 127, 188, 43 U.S. 127, 188, 11 L.Ed. 205, had said: 'It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation (here the City of Philadelphia) was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust'."

I am sorry to have taken so much of the time of the Council in this matter, but if you will bear in mind these decisions of the Courts and the wording of these deeds you can see that serious questions arise in connection with these specific areas, and I am unable to give you a Yes or No answer. In the final analysis, these questions are questions to be determined by the Court. One way to have that done is by having an appropriate proceeding instituted and setting out all of the facts and having the Court render a declaratory judgment upon the facts. This would

determine the legal status of the matter and set out the legal obligation of the City in connection therewith.

I will be glad to try to answer any questions any member of the Council desires to ask in connection with any of these matters.

C. V. JONES
City Attorney.

GOVERNMENTAL FACILITIES
Baseball Parks—North Carolina

The City Attorney of Durham, North Carolina, has rendered an opinion to the city manager concerning admission policies of the Durham Athletic Park while under lease to a private sports promoter for use as a baseball field. The City Attorney expressed the view that the city might not permit the lessee to commit any unlawful act or practice. The opinion, dated May 16, 1957, follows:

May 16, 1957

Mr. R. W. Flack,
City Manager,
Durham, North Carolina.

Dear Mr. Flack:

I am sorry that the answer to your recent inquiry concerning the handling of admission and seating of spectators attending baseball games at Durham Athletic Park has been delayed until this time. However, you are familiar with the fact that this office has been kept tied up constantly with work on several urgent matters which were pending and had to be completed, and for that reason it was not possible for me to get to this subject until now.

Counsel representing the Protestants in this matter have been kind enough to furnish me with some citation of Court decisions, and I have read most of them. While the general subject has received considerable attention by the Courts, none of the cases cited to me were bottomed upon facts substantially similar to the facts in this matter.

For example, one of the cases cited concerned the lease by the City of Louisville, Ky., of an Amphitheatre owned by the City in its public park system, but an examination of the facts of that case discloses that the lease was to a private non-profit corporation for 5 years to be used on certain dates for dramatic, operatic and other entertainments, and *all* profits from the operations were paid to the City; the City controlled scale of admission fees and other details and required that once a year the Association was to furnish the City with a complete statement of all entertainment produced by it or under its auspices during the preceding season, the scale of admission charged the public, the number of persons attending the performances, etc., and an audited statement of monies received and expenditures made. In addition, the City designated certain parks for white and certain parks for Negro use, and this Amphitheatre was in the area designated for use by the white patrons, and there was a City rule, which was enforced, that neither race could use the facilities provided and set apart for the other race. Under these facts, the U.S. Supreme Court held that there was unlawful discrimination in refusing to sell a Negro patron a ticket to the Amphitheatre. In another cited case, the Court held that Negroes could not be excluded, solely because of race, from being allowed to eat in the cafeteria constructed by public funds in the basement of the County Courthouse in Houston, Tex. And in the recent case of Greensboro which was decided by Federal Judge Johnson J. Hayes of our own U. S. District Court, and which involved the question of denying Negro citizens the right to play golf on a publicly owned golf course which had been set apart for use of the white citizens, the facts found by the Court showed that this golf course was publicly owned and supported and while being publicly operated by the City of Greensboro a citizen of the Negro race applied for and was denied the privilege of playing on the course; that thereafter, and because of objections made by citizens, the City and Board of Education leased the course to a non-profit corporation solely for the purpose of operating the course as

a public golf course; the corporation then laid down some rules, among which was one which closed the course to Negroes; the City retained control, even though there was the fiction of a lease; and Judge Hayes found that "It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment of the use of the park."

In our case, on the other hand, there is no suggestion that this Permit was made as a subterfuge or device to circumvent any legal obligation the City may owe its citizens. It also must be conceded that the transaction between the City and Durham Sports Enterprises was made in good faith, and the terms stated in the Permit are the actual, as distinguished from fictional, terms existing; and that when the Permit states that Permittee "has entire charge of the grandstand, bleachers, and playing field beginning three hours before the scheduled hour to begin a day or night home game" such statement is true.

Therefore, if there has been any unlawful discrimination against any of the citizens of Durham in the enjoyment of the use of this park to see the Durham Bulls play baseball, such acts are not the acts of the City. On this specific point I quote what the U. S. Court of Appeals for the 5th Circuit said in the Houston case cited by counsel and referred to above, as follows:

> "Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used or needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

The above quoted language from the Houston case might apply to the situation with which we are dealing, except for two specific reasons: (1) That the Durham Athletic Park is not surplus property which is not used or needed for City purposes, and (2) no valid permit may be given by the City to authorize a use which is unlawful. Accordingly, I think that while, under the Permit issued by the Director of Recreation, Durham Sports Enterprises may during the periods covered by the Permit use the premises for any lawful purpose consistent with the purposes set out in the deed of conveyance of the property to the City, i.e., for public park and recreational purposes, it would have no authority under the terms of the Permit to commit any unlawful act or practice. The question of what acts or practices constitute unlawful acts on the part of Durham Sports Enterprises would ultimately be a question for determination by the Court upon the facts presented in a given case. I assume the Durham Sports Enterprises will consult its own counsel for the purpose of being advised as to its legal obligation under the present Permit. In the event the City should desire to make more explicit provisions in future Permits and therein spell out in more detail the things which may and may not be done, and thus eliminate questions of interpretation, it has the authority to do so.

Very truly yours,

C. V. JONES
City Attorney

REAL PROPERTY
Deeds—North Carolina

See the memorandum of the Durham, North Carolina, City Attorney at p. 874.

PUBLIC ACCOMMODATIONS
Housing—Washington

The Attorney General of Washington was requested for an opinion whether the provisions of House Bill No. 25 (enacted as Ch. 37, Washington Laws, 1957, 2 Race Rel. L. Rep. 461)

relating to the prohibition of discrimination in publicly assisted housing were constitutional and in conformity with federal statutes. The Attorney General stated that the bill was constitutional and did not conflict with federal statutes.

February 6, 1957

Honorable Fred H. Dore
Chairman
Judiciary Committee
House of Representatives
Legislative Building
Olympia, Washington

Cite as:
AGO 57-58 No. 12

Dear Sir:

This is in answer to your request for an opinion with regard to the constitutionality of provisions of House Bill No. 25, relating to civil rights in publicly-assisted housing. Your specific question is as follows:

Are the provisions of Sec. 15 of H.B. 25 constitutional or can they be considered an unlawful exercise of legislative authority by the state in placing conditions on federally assisted public housing?

Our answer is as follows:

The provisions of sec. 15 of H.B. 25 are constitutional and in conformity with the federal constitution and statutes.

ANALYSIS

The provisions of H.B. 25 with which you are concerned add a new section to chapter 49.60 RCW, which is to be known as the "Law Against Discrimination." Under the provisions of section 15, it has been made an unfair practice for there to be any discrimination whatsoever, in publicly assisted housing, against any person because of his race, creed, color or national origin.

Our theory of government in the United States is that the people, in full possession of "inherent, inalienable rights" have formed the government in order to protect their personal rights. Thus have placed provisions in the constitutions of the federal government and of each of the states prohibiting any form of procedure which would arbitrarily single out any individual or classes and permit them to be dealt with in a manner unreasonably different from that in which others simularily situated are dealt with. 11 C. J. S. § 976. The matter of protection of these personal rights is of concern to the federal government as well as to each state government. However, your question arises because of the possible conflict of a state legislative enactment with acts of Congress in view of the nature of the problem involved, i.e., publicly-assisted housing. Under our system of government, certain defined powers have been delegated to the national government and equally certain powers have been reserved to state or local control. The supreme court of the United States, at an early date, laid down a broad formula which from that time on has been the general principle governing the possibility of state exercise of legislative power. In the case of Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L.Ed. 19, the court held that the states may evercise concurrent or independent power in all cases except three:

(1) Where the power is lodged exclusively in the federal constitution;
(2) where it is given to the United States and prohibited to the states; and
(3) where, from the nature and subjects of the power, it must be necessarily exercised by the national government.

Under the provisions of the federal constitution, the constitution itself and the laws passed pursuant thereto are the supreme law of the land. If a law passed by a state in the exercise of its acknowledged powers comes into conflict with an act of congress, the state law must yield. Where Congress has the right of exclusive jurisdiction under the federal constitution and used its power to cover the field (as in the field of interstate commerce) state legislation ceases to have any effect, for an act of Congress supersedes all existing state legislation. However, as act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several states to enact regulations covering other aspects of the subject, or merely to supplement the federal legislation in respect to local conditions, as, for example, in the field of insolvency. 11 Am. Jur. 871, § 175 et seq.

A state law is superseded by a federal regulation only to the extent that the two may be inconsistent. When the question is whether the federal act overrides a state law, a state law en-

acted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress unless there is an actual repugnancy or unless Congress has manifested a purpose to exercise its paramount authority over the subject.

In the present instance, the only provision in the constitution of the United States which, in our view, might grant the federal government exclusive jurisdiction, empowers Congress under Article 1, § 8, Clause 17:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and *to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;****"
> (Emphasis supplied)

However, that section clearly does not apply to the subject of public housing with which you are presently concerned. In addition, it has been interpreted to mean that a state and the United States could agree with respect to whether the federal government was to exercise mutual or exclusive jurisdiction over land so acquired by the United States within the state. Silas Mason co. v. Tax Commission of State of Washington, 58 S.Ct. 233, 302 U. S. 186, 82 L.ed. 187.

In the present instance, there can be little doubt but that the provisions of H.B. 25, to which you refer, are constitutional and within the delegated authority of each state to enact legislation on the subject, in view of the act of Congress relating to national housing found in USCA Title 42, § 1547, and providing as follows:

> "Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to subchapters 11-V11 of this chapter shall not deprive any State or political subdivision thereof, including any Territory or possession of the United States, of its civil and criminal jurisdicton in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property. As used in this section the term 'State' shall include the District of Columbia.***"

In addition, Congress enacted the following provision found in USCA Title 42, § 1413 (b) relating to low-rent housing:

> "The acquisition by the Administration of any real property pursuant to this chapter shall not deprive any State or political subdivision thereof of its civil and criminal jursdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property; and, insofar as any such jurisdiction may have been taken away or any such rights impaired by reason of the acquisition of any property transferred to the Administration pursuant to section 1404 (d) of this title, such jurisdiction and such rights are fully restored."

Clearly, under these acts, each state is allowed to exercise control over the protection of the civil rights of its citizens in matters relating to federally assisted housing. In conclusion, therefore, inasmuch as the provisions of H.B. 25 do not come within the three exceptions to the rule that the state may evercise concurrent or independent power with Congress, and inasmuch as Congress has seen fit to enact laws specifically reserving to each state its civil and criminal jurisdiction and control of civil rights in national housing of all descriptons, there can be little doubt but that the proposed legislation is constitutional. Consequently the state legislature would be acting within its authority in enacting such legislaton.

We trust the foregoing will prove helpful.

Very truly yours,

JOHN J. O'CONNELL
Attorney General

JANE DOWDLE SMITH
Assistant Attorney General

RACE RELATIONS LAW SURVEY
May, 1954–May, 1957

I. Introduction

In its May, 1954, decision in the *School Segregation Cases* (I:5, 9)* the Supreme Court of the United States declared invalid laws which required separation in the public schools on the basis of race or color. Regardless of equality in tangible factors, such segregation pursuant to law, the court said, was inherently unequal and violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution (in the case of a state) and of liberty under the Due Process Clause of the Fifth Amendment (in the case of the federal government).

No other court decision in this century has had comparable repercussions. Three years after the event these continue to provide daily fare for the press and other news media. The Supreme Court's proclamation and the action in many of the southern states to avert the effect of the pronouncement have produced a constitutional crisis of unprecedented magnitude in the period since 1865. Congressional debate over civil rights and even the controversial reception of other recent Supreme Court decisions are all parts of the larger pattern.

The dynamism of the 1954 school decisions is demonstrated by the fact that the principle, originally stated and supported in terms of public education, has been applied, within the three-year period, to invalidate legalized racial segregation in governmentally-owned recreational facilities and in local as well as interstate transportation facilities. Some lower courts apparently treat the principle as amounting to a declaration of the unconstitutionality of all compulsory racial segregation in facilities owned or operated by any level of government, or by order of government in privately-owned facilities. Whether the principle will be considered broad enough to invalidate as unconstitutional any racial distinction based on law or supported by governmental authority remains to be determined.

The impact of the *School Segregation Cases* may be observed in many matters other than public education. Geographically the consequences have not been confined to the southern and border states which had school segregation laws. Both of the foregoing observations are illustrated in the *Girard College Case* (I:325, 340; II:68, 591, 811). The Supreme Court of the United States made clear in April, 1957 that a municipal agency of the City of Philadelphia, Pennsylvania, in its administration of the trust created by Stephen Girard in 1830, could not bar a Negro boy from Girard College on the ground that he was not "white" even though Girard's will specified provision for "poor white male orphans."

School segregation questions in Ohio (I:311, 518); California (I:48); New Jersey (I:255) and New York (II:231, 507) all reflect directly the impact of the Supreme Court's 1954 decisions. The indirect effects are manifold in all sections of the country. They are not limited to matters of white-Negro relationships. The decisions do not, of course, reach directly "merely private" racial discrimination in such matters as employment or in the use of accommodations normally open to the public. But added impetus has been given since May, 1954, to enacting additional state statutes and municipal ordinances invalidating such discrimination in states outside of the resisting southern states (including some border states which formerly had legalized school segregation). State and local commissions studying discrimination and the reports regarding the

* References to the complete report of the decision or other materials in RACE RELATIONS LAW REPORTER will be made in this fashion, using Roman numerals for the volume number and Arabic for the page number. Thus the reference above is to Volume One, RACE RELATIONS LAW REPORTER, pages 5 and 9 (February, 1956, issue). For additional reporter citations on any case see the Cumulative Table of Cases at the end of Volume One of the REPORTER (Pages 1167-1174) (December, 1956, issue) and the cumulative table at the end of each subsequent issue.

administration of these new laws as well as of those previously enacted show that in these areas too the Supreme Court pronouncements have had their noticeable effect.

Since the RACE RELATIONS LAW REPORTER has attempted to print (normally in full text) all significant legal materials involving an issue of race or color beginning with May, 1954, the nine issues published (prior to August, 1957) provide an opportunity to study in detail the consequences over a three-year period of the *School Segregation Cases* embodied in other court decisions, legislation, commission reports, attorney general opinions, etc. In addition, the scope of the coverage results in the publication of materials where the legal principles involving race were already established, such as in connection with voting, the selection of grand and trial jurors and the enforcement of restrictive real estate convenants.

In this survey only the more important developments under the principal headings will be treated. The fifteen-page topical and geographical index in the December, 1956, issue of the REPORTER (Volume One, Number Six, Pages 1177-1191) and the analytical Table of Contents in the front of each individual issue are referred to for more detailed references covering each topic.

II. Education—Public Schools

A. The Principle of the School Segregation Cases.

Mr. Chief Justice Warren, speaking for the court, stated in 1955 that the fundamental principle of the 1954 opinions in the *School Segregation Cases* is that "racial discrimination in public education is unconstitutional" and that "all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle." (I:11). Earlier the Supreme Court of Delaware in February, 1955, had said: "Its [the 1954 decision's] necessary present effect is to nullify the provisions of the Delaware Constitution and statutes requiring separate schools for whites and Negroes." (I:50, 53). Similar recognition of the effect of the decision may be found in decisions of the highest state courts in Florida (I:124); Maryland (II:597); North Carolina (I:658); Tennessee (I:1051) and Texas (I:77) as well as by United States courts in Arkansas (I:43, 45); Kentucky (I:64, 66); Louisiana (I:305); South Carolina (1:73); Tennessee (I:118) and Virginia (I:886).

As applied to practical school administration the three-judge United States District Court, considering on remand the South Carolina case (I:73), in a per curiam opinion generally attributed to Chief Circuit Judge Parker, attempted to give more precision to the principle:

> ". . . it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of govermental power to enforce segregation."

To the same effect see the opinion of the United States District Court in Kansas on the remand of the *Brown Case* (I:63).

Police power. Federal courts in Louisiana (I:305; II:308) and Virginia (I:886) have found

that the principle announced in the *School Segregation Cases*, and its effect in invalidating state laws, is in no way limited by a claim that a state "police power" is being exercised. Judge Tuttle of the United States Court of Appeals for the Fifth Circuit, in discussing affidavits filed in support of Louisiana's constitutional amendment and other segregation legislation (I:239) passed subsequent to the 1954 Supreme Court decision said:

> ". . . They [the affidavits] deal with the alleged disparity between the two races as to intelligence ratings, school progress, incidence of certain diseases, and percentage of illegitimate births, in all of which statistical studies one race shows up to poor advantage. This represents an effort to justify a classification of students by race on the grounds that one race possesses a higher percentage of undesirable traits, attributes or conditions. Strangely enough there seems never to have been any effort to classify the students of the Orleans Parish according to the degree to which they possess these traits. That is, there seems to have been no attempt to deny schooling to, or to segregate from other children, those of illegitimate birth or having social diseases or having below average intelligence quotients or learning ability because of those particular facts. Whereas any reasonable classification of students according to their proficiency or health traits might well be considered legitimate within the normal constitutional requirements or equal protection of the laws it is unthinkable that an arbitrary classification by race because of a more frequent identification of one race than another with certain undesirable qualities would be such reasonable classification.
>
> "The use of the term police power works no magic itself. Undeniably the States retain an extremely broad police power. This power, however, as everyone knows, is itself limited by the protective shield of the Federal Constitution. Thus . . . municipal zoning laws passed to require racially segregated residential zoning have been struck down under the Fourteenth Amendment . . .
>
> "Probably the most clear cut answer to this effort by the State of Louisiana to continue the pattern of segregated schools in spite of the clear and unequivocal pronouncement of the Supreme Court in the School Segregation cases is that this is precisely what was expressly forbidden by those decisions. Whatever may have been thought heretofore as to the reasonableness of classifying public school pupils by race for the purpose of requiring attendance at separate schools, it is now perfectly clear that such classification is no longer permissible whether such classification is sought to be made from sentiment, tradition, caprice, or in exercise of the State's police power." (II:308, 313-314).

Fourteenth Amendment. In some instances the challenge to the principles of the *School Segregation Cases* questions whether the Fourteenth Amendment (with its Equal Protection Clause) was properly ratified so as validly to become a part of the Federal Constitution. These arguments, when raised before the courts, have been uniformly rejected (I:1042; II:597). Both of the decisions cited quote approvingly an explanation by Chief Justice Hughes in a 1939 decision by the Supreme Court of the United States to the effect that the question of ratification of the Fourteenth Amendment was not a justiciable matter for court determination but a "political question" with ultimate authority of decision in Congress. The Georgia General Assembly has memorialized Congress to declare the Amendment invalid (II:483).

Interposition. The various resolutions of "interposition" adopted in a number of states as vehicles of protest against the School Segregation decisions reflect some ambiguity in the meaning of the term (I:437, 438, 440, 443, 445, 591, 573 and 948; II:228, 481). [A background study and additional material will be found at I:465-499 and I:435, 462 and 1024]. To the extent that such resolutions do no more than protest against the decisions or call for a constitutional amendment to change the result or announce an intention to resist the principles announced by "every lawful means" their present legal significance is comparable to the Georgia resolution calling for impeachment of certain Supreme Court justices (II:485). Some of the resolutions, however, are pertinent to a discussion of the principle of the *School Segrega-*

tion Cases because they attack that principle and assert that the decisions in question are "null, void and of no effect" within the boundary of the particular state (I:440, 442).

Not one of the interposition resolutions referred to has been utilized in any of the court proceedings as a reason for avoiding the application of the principle of the *School Segregation Cases.* In fact the only effect of such resolution in the actual conduct of litigation has been to provide one basis for the federal district court's holding invalid certain Virginia legislation applicable to the placement of pupils (II:46). The Attorney General of Virginia had previously advised that the interposition resolution passed in that state did not have the force and effect of law in a court proceeding, (I:462).

If the term "interposition" is taken to include all organized official activity of resistance in a state to unwanted federal law, then it is obvious that the measures of state defense and counter-attack discussed below (*c. State Defensive Measures,* p. 889) should be considered under this heading.

B. Implementation of the Principle.

In its 1955 decision in the *School Segregation Cases* (I:11) the Supreme Court of the United States returned the cases to the lower courts for the entry of appropriate orders carrying out the principle previously announced "with all deliberate speed." This decision permitted the lower federal and state courts to exercise broad discretion in taking account of local conditions and requirements affecting the manner and timing of compliance with the announced constitutional principles.

In speaking of the appropriate decrees to be entered, the 1955 opinion states:

> ". . . At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and the revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." (I:11, 12).

Plans approved. In the cases which provided the occasion for the above pronouncement, action was taken to comply in Kansas (I:63); Delaware (see I:50) and the District of Columbia (see I:305). Only in the Topeka, Kansas, instance was a court-approved plan of desegregation involved. The federal district court approved the plan submitted by the local board of education in this case, even though it was not considered to accomplish desegregation fully or immediately and involved an element of choice for beginning students as to the school attended. Plans for complete desegregation within a year were involved in several consent orders entered by federal district courts against school boards in West Virginia (I:319, 321, 521, 892). Webster County, Kentucky (II:304) pursuant to court direction, presented

a plan for the elimination of racial segregation in its schools beginning in September, 1957. A similar result was reached by consent in a case involving the Scott County, Kentucky, schools (II:597).

School officials in Little Rock, Arkansas, received federal court approval in 1956 for a plan of gradual desegregation of public schools of that city over a period of six years, beginning in the fall of 1957 with high school grades (I:851). The United States Court of Appeals for the Eighth Circuit has affirmed this decision (II:593), finding an "unqualified basis for the district court's conclusions that the proposed plan constitutes a good faith, prompt and reasonable start toward full compliance with the Supreme Court's mandate." The Court of Appeals observed, however, that

> "It may be that in the future, as the plan of integration begins to operate, a showing could then be made to the effect that more time was being taken than was necessary. Upon such finding the district court would have the power to see that the plan of gradual integration was accelerated at a greater rate than now proposed." (II:595).

In March, 1956, the United States District Court granted a continuance in a desegregation proceeding against the board of education of the city of Nashville, Tennessee (I:519), although no specific plan for compliance had been presented to the court. It was noted that the board of education had announced its intention to comply with the ruling of the Supreme Court "and has proceeded promptly to take steps toward that end, and is acting now in good faith and with appropriate dispatch in awaiting the taking of the school census and giving careful consideration to all factors involved, so as to arrive at a workable plan of integration..." (I:520). In January, 1957, the federal court approved portions of a board plan which called for the abolition of compulsory racial segregation in the first grade of the elementary schools of the city of Nashville for the school year beginning in September, 1957. The approved plan also provided for a limited right of transfer on the basis of the racial composition of the school attended (II:21). The court disapproved the portion of the plan calling for further committee study and recommendations to the board of education as to the "next step" by December 31, 1957. Instead, the court directed that there be submitted to it by the date in question "a complete plan to abolish segregation in all of the remaining grades of the city school system including a time schedule therefor..." (II:25).

Plans disapproved. In addition to the disapproval of the portion of the Nashville plan relating to the extent and timing of voluntary desegregation noted above, there have been other findings by federal courts in school cases that "all deliberate speed" is not being achieved. Plans involving future school construction, classified as "vague and indefinite," were not accepted as a reason for failure to enter an order of desegregation for the ensuing school year in the Adair County, Kentucky, case (I:66). Actions of federal district courts in Texas in refusing relief against school boards in Dallas and Mansfield, who presented no concrete plans for desegregation (I:75; 318), were reversed by the United States Court of Appeals for the Fifth Circuit (I:649 and 655) (but see II:32; 805).

The board of education of Hopkins County, Kentucky, presented the federal court a plan calling for desegregation of the first grade in 1956 and thereafter for an additional grade per year until complete desegregation was accomplished over a twelve-year period (I:966, 1038). While treated by the court as a good faith action, the provisions were nevertheless not acceptable. The court allowed four months to the defendants to "present a plan that will conform to the laws of the United States" (I:1038). A four-year voluntary integration plan was later submitted to the court but this too was disapproved and the school officials were directed to achieve "complete integration" on a voluntary basis in the schools as of the beginning of the next term in September, 1957 (II:305).

No plans. While courts have given approval to desegregation plans involving no immediate elimination of racial distinctions, they have treated other plans or reasons for delay as insufficient to prevent the entering of an order requiring elimination of racial segregation forthwith. Perhaps the most notable cases in this regard are those by the Fifth Circuit Court of Appeals in connection with actions against the Dallas and Mansfield school boards in Texas (I:649, 655). Likewise, the United States Court of Appeals for the Sixth Circuit reversed a federal

district court in Ohio which had refused to enjoin racial segregation in the Hillsboro, Ohio, schools (I:311). The refusal had been based on the grounds that an injunction would "disrupt the orderly administration of the schools." The Court of Appeals considered it an abuse of discretion to refuse the injunction, calling attention to Ohio law as well as to the requirements announced in the *School Segregation Cases*. An immediate discontinuance of racial discrimination in admission to schools in Pottawatomie County, Oklahoma, was ordered by the federal court in January, 1957 (II:316).

A federal court in Arkansas entered a general order against school officials in Van Buren in terms of the 1955 decision of the Supreme Court of the United States and in its order set a time limit for the submission to it of a plan of desegregation (I:299; 860). The same judge had earlier taken less stringent action with respect to Bearden, Arkansas, school officials (I:45). A requirement that plans for non-complying districts be submitted to the court by state and local boards within a sixty day period was made by the federal court in Delaware in 1957 (II:301).

In Arlington, Charlottesville, Newport News and Norfolk, Virginia, the defendant school officials had not asserted any present intention to desegregate at any time. In these cases orders requiring elimination of racial discrimination within a limited period at Charlottesville and Arlington have been entered by the district courts and approved by the Court of Appeals for the Fourth Circuit (I:866, 890; II:59). Judge Paul, in the Charlottesville case, said on this point,

> "It only remains to be determined as to the time when an injunction restraining defendants from maintaining segregated schools shall become effective. The original decision of the Supreme Court was over two years ago. Its supplementary opinion directing that a prompt and reasonable start be made toward desegregation was handed down fourteen months ago. Defendants admit that they have taken no steps toward compliance with the ruling of the Supreme Court. They have not requested that the effective date of any action taken by this court be deferred to some future time or some future school year. They have not asked for any extension of time within which to embark on a program of desegregation. On the contrary the defense has been one of seeking to avoid any integration of the schools in either the near or distant future. They have given no evidence of any willingness to comply with the ruling of the Supreme Court at any time. In view of all these circumstances it is not seen where any good can be accomplished by deferring the effective date of the court's decree beyond the beginning of the school session this Autumn. Even though the time be limited it is not impossible that, at the school session opening in September of this year, a reasonable start be made toward complying with the decision of the Supreme Court." (I:886, 889-890).

The absence of an indication of a purpose to begin good faith compliance was made the basis of court orders of immediate desegregation in the Norfolk and Newport News cases (II:334, 337).

Judge Hutcheson, of the Court of Appeals for the Fifth Circuit, said in reversing the lower federal court's refusal to enter an order for the plaintiffs in the Mansfield, Texas, case:

> "We think it clear that, upon the plainest principles governing cases of this kind, the decision appealed from was wrong in refusing to declare the constitutional rights of plaintiffs to have the School Board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration to abolish segregation in Mansfield's only high school and to put into effect desegregation there.
>
> "Had the court made such a declaration and retained the cause for further orders necessary to implement it, deferment to a later time of action on the prayer for injunctive relief, if necessary, may well have been within his discretion. The issuance of such a declaration of rights with retention of the case would have given the court the means of effectually dispelling the misapprehension of the school authorities as to the nature of their new and profound obligations and compelling their prompt performance of them." (I:655, 657).

An injunction was issued against the Orleans Parish School Board in Louisiana in 1956, requiring the end of racial segregation in the schools, but placing no definite time limitation. The order of the federal district court reads:

> "It is ordered, adjudged and decreed that the defendant, Orleans Parish School Board, a corporation, and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, supra." (I:306, 308).

This was affirmed by the Fifth Circuit (II:308). Circuit Judge Tuttle treats the matter of flexibility in the application of the order to desegregate in this case in the following terms:

> "It is evident from the tone and content of the trial court's order and the willing acquiescence in the delay by the aggrieved pupils that a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil. Nevertheless whether there is such acceptance by the Board or not, the duty of the court is plain. The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties. However undesirable it may be for courts to invoke Federal power to stay action under state authority, it was precisely to require such interposition that the Fourteenth Amendment was adopted by the people of the United States. Its adoption implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them" (II:308, 316).

In contrast with the above decisions, it is important to note certain instances in which no steps have been taken to compel a specific time limitation for school desegregation. This situation still prevails in two of the original *School Segregation Cases.* In *Briggs v. Elliott,* the South Carolina case (I:73), the defendant school officials were enjoined by the three-judge federal court from refusing, on account of race, to admit to schools under their supervision any child

> "... from and after such time as they may have made the necessary arrangements for admission of children to such schools on a nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause."

A similar decree was entered in the case involving Prince Edward County, Virginia (I:82). Subsequently plaintiffs asked the federal court to fix a time limit for compliance. The school officials in turn sought dismissal, alleging a failure to exhaust administrative remedies under the Virginia pupil placement law enacted after the suit was started. The court refused to require the exhaustion of administrative remedies by the Negro applicants but also refused to order a definite time for desegregation. The court did note the Virginia legislation which indicated a closing of the public schools in the event of integration being ordered. The court said:

> "The passage of time with apparent inaction on the part of the defendants of itself does not necessarily show non-compliance. This is illustrated by the fact that after the appeal in this case was granted in May, 1952, more than three years elapsed before the mandate of the Supreme Court was received. I find that the defendants by submitting the usual budget requesting appropriations have done all that reasonably could be required of them in this period of transition. Action which might cause mixing the schools at this time, resulting in closing them, would be highly and permanently injurious to children of both races. Relations between the members of the two races in the county would be adversely af-

fected and a final solution of the vexing problems delayed as a consequence.

"At this time the children of both races are being afforded opportunities for an education under an adequate system that has been formulated over the years. If an order should result in racially integrated schools, the school system of itself would change greatly. Plans should be made to keep within bounds the automatic adjustments that would follow in order that society not be too drastically affected.

"Many minds are now engaged in seeking an equitable solution of the problem, including those of the defendants. As was said by a great statesman, 'The march of the human mind is slow.' It is inconceivable that any of the litigants or other persons affected would willingly see the public school system abolished or an interruption in the education of the children of the county. Either result would be disastrous to both public and private interests of the county.

"It is imperative that additional time be allowed the defendants in this case, who find themselves in a position of helplessness unless the Court considers their situation from an equitable and reasonable viewpoint.

"Considering all the factors, it is my conclusion that decision of the motion for further relief filed by the plaintiffs should be withheld at this time, with the reservation to the plaintiffs of the right to renew the motion at a later date after the defendants have been afforded a reasonable time to effect a solution." (II:341 at 348).

Within the three-year period there were other decisions affecting school desegregation in Florida (II:9); Maryland (I:862); North Carolina (I:70; II:16); South Carolina (I:519) and Texas (II:28, 319), none of which reached the question of implementation of the principle in the *School Segregation Cases*. There were no decisions relating to public school integration in Georgia, Alabama or Mississippi.

The question of exhaustion of administrative remedies discussed subsequently in connection with state pupil placement laws is necessarily closely related to this topic of implementation of the principle announced in the Supreme Court decisions.

Protection of implementation. Persons asserting rights in the federal courts against racial segregation in the schools normally utilize the previously established machinery of these federal courts for the enforcement of rights "arising under" the Constitution and laws of the United States. (See reference article on "Federal Jurisdiction" at II:269). Orders growing out of such cases are enforced through the normal machinery for the enforcement of federal court orders including the power to punish for contempt. In connection with the school segregation issue, however, there have been two important cases where school boards, in the process of carrying out a desegregation program, have sought the protection of federal courts.

Officials of the Hoxie, Arkansas, school district brought an action in federal district court to restrain certain persons and organizations from interfering with the efforts of the school officials to operate the schools on a racially nondiscriminatory basis. Preliminary and permanent injunctions were granted by the lower court (I:43, 299). On appeal to the United States Court of Appeals for the Eighth Circuit the defendants urged lack of jurisdiction in the federal district court. *Amicus curiae* briefs were filed by the United States through the Department of Justice and by the Attorney General of Georgia. The Court of Appeals affirmed the granting of the injunction, holding that the "free speech" protection of the Constitution does not extend to the activities of defendants in attempting to incite disobedience to law. Federal court jurisdiction was found to exist both under general "federal question" jurisdiction, 28 U.S.C., Section 1331, and also by reason of 42 U.S.C., Section 1985(3). The Court of Appeals said:

> "The plaintiffs being bound by constitutionally-imposed duty and their oaths of office to support the Fourteenth Amendment and to secure equal protection of the laws to all persons in their operation of the Hoxie schools must be deemed to have a right which is a federal right to be free from direct interference in the performance of that duty." (I:1027 at 1032).

In the case involving the Clinton, Tennessee, school the defendant school officials had been ordered by the court to admit pupils to the Clinton High school on a racially nondiscrimina-

tory basis beginning with the fall, 1956, school term (I:317). At the opening of the fall term the school officials petitioned the court for a restraining order alleging that John Kasper and certain other persons were interfering with the defendants' compliance with the court's order. The court issued a temporary restraining order against several named and unnamed persons. These orders have subsequently been enforced by contempt proceedings against John Kasper individually and against a group of individual defendants including Kasper. (See I:1045; II:26, 317, 792 and 795).

C. State Defensive Measures.

State measures adopted for the purpose of preventing school desegregation may be grouped roughly into those that are negative or defensive as against attempts to desegregate and those affirmative or more general measures of resistance that are comparable to counter-attacks. The general plan or program of a particular state is frequently best understood by examining the reports of commissions which preceded the enactment of legislation as in Arkansas (I:717); Florida (I:921); North Carolina (I:581); Texas (I:1077) and Virginia (I:241). Statutes have been passed in many of the states for the avowed purpose of slowing or preventing efforts to gain admission to specific schools on a non-segregated basis. Included are statutes relating to pupil placement, public school closing, tuition grants for attendance in private schools, restrictions on appropriations to forbid their use in integrated situations, repeal of compulsory school attendance laws, withdrawal of authority from local officials and attempted withdrawal of consent to suit against the state in school cases. There are more than one hundred entries under the topic "legislation" appearing in the Volume One Topical Index (I:1177, 1185-1186). The bulk of these items represent state enactments under one of the above topics or other similar headings. There have been a number of items added in the first three issues of Volume Two of the REPORTER, particularly the statutes enacted in Tennessee (II:215-222) and Texas (II:693-695).

Pupil placement. Legislation referred to as pupil or school placement laws has been enacted in Alabama (I:235), Arkansas (I:579, 1077), Florida (I:237, 924), North Carolina (I:240, 939), South Carolina (I:586), Tennessee (II:215), Texas (II:693) and Virginia (I:1109).

The usual provision of these laws is to authorize and require the local board of education to control assignment of pupils to public schools. In the carrying out of its function of assigning pupils, the board is usually supplied by statute with a large number of factors which it is to consider in making a decision. A few of the factors, for example, mentioned in the Tennessee statute are: "available room and teaching capacity in various schools"; "geographical location and place of residence of the pupil"; "availability of transportation facilities"; "the effect of the enrollment and the welfare and best interests of such pupil and all other pupils in a certain school"; "the psychological effect of the attendance of such pupil at a particular school." The foregoing list is selected from the more than twenty that are set out in Section Two of the Tennessee law (II:216). The Texas statute forbids the use as an element of decision "national origin" or "ancestral language" (II:694).

Provision is made in these laws for a review if needed by higher school officials within the state and then subsequently a review through the court system of the state of the administrative action taken in the assignment of the particular pupil. The specific manner of taking a review from the action of one school official to the next higher administrative level and the time limitations for securing such review are usually detailed in the statute. North Carolina provides for a trial *de novo* in the courts before a jury (I:240) if an applicant would question the action of a school board in an assignment.

A major purpose in the utilization of these pupil placement laws apparently is to secure the advantage of the legal doctrine related to the requirement that a person must normally exhaust his administrative remedies before he goes into a federal court seeking relief against action taken by state officials. A background study of this doctrine will be found at II:561-582. The utilization of this doctrine in school desegregation cases has produced varying results which seem to turn upon the wording of the particular state law, with respect to the authority given to the administrative agency and the method of review provided. The United States Court of Appeals for the Fourth Circuit first announced in a desegregation suit the require-

ment for exhaustion of administrative remedies under a state statute (I:240) in the McDowell County, North Carolina case (I:70). After the Court of Appeals had instructed the district court to reconsider a school desegregation case in light of recently-enacted North Carolina school placement laws, the Negro applicants brought a class action in a North Carolina state court seeking admission to the public schools without regard to color. The state court found a misjoinder of parties (I:515) and the North Carolina Supreme Court affirmed on the ground that under the state placement act the application of each child stood on an individual basis, hence the class action resulted in a misjoinder of parties (I:646).

The plaintiffs in the above case then moved in the federal district court, where the original action was pending, for injunctive relief and a declaratory judgment as to their right to attend the county schools without asserting compliance with the state act. The federal district court refused to allow the filing of the complaint until administrative remedies had been exhausted. The United States Court of Appeals for the Fourth Circuit in turn refused to order the lower court to permit the plaintiffs to proceed "as though the pupil enrollment act had never been enacted" (II:16). While excepting any requirement to exhaust state judicial remedies, the court again held that administrative remedies afforded by the placement act must be utilized as a necessary prerequisite to securing federal court action. The court said the North Carolina statute was not unconstitutional on its face and it would not be assumed that it would be administered in an unconstitutional manner. The Supreme Court of the United States declined to review this decision (II:300).

A similar requirement that administrative remedies be exhausted before seeking federal court relief was declared by the Fourth Circuit in a case arising from South Carolina (I:519).

In explaining the decision in the North Carolina case, Chief Judge Parker of the Fourth Circuit, stated in a later decision:

> "In that case, however, an adequate administrative remedy had been prescribed by statute, the plaintiffs there had failed to pursue the remedy as outlined by the decision of the supreme court of the state and there was nothing upon which a court could say that if they had followed such remedy their rights under the Constitution would have been denied them." (II:59 at 63).

These remarks were made in the review of the Charlottesville and Arlington, Virginia, cases in which the court affirmed decrees requiring desegregation in these localities, without requiring exhaustion of administrative remedies in advance of a court order. In these particular cases, however, the Virginia pupil placement law had not become effective at the time suit was filed in federal court. Judge Parker observed that:

> "... in view of the announced policy of the respective school boards any such application to a school other than a segregated school maintained for colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief."

In consolidated cases involving school boards of Norfolk and Newport News, Virginia, the federal district court in January, 1957, overruled motions to dismiss on the ground that the plaintiffs had not exhausted the administrative remedies afforded them by the Virginia pupil placement act. The court held the act in question to be unconstitutional on its face, after reviewing the legislative history and the prior adoption of a resolution of interposition (II:46; and see II:334 and 337). The court felt that the legislation was necessarily invalid, because it required the state pupil placement board to consider the race of the child in making assignments to schools. The court further declared that the remedy afforded by the act, even if not unconstitutional, was not an adequate remedy which the pupil would be required to exhaust before proceeding with court action. The Virginia statute provided for a single state assignment board rather than local boards, as is usual in the statutes of the other states. Furthermore, under Virginia legislation, state funds would be withdrawn from any integrated school and the normal administration of such schools was to be collapsed, with emergency power to be exercised by the governor and other state officials (I:1091-1113). The federal district court (Judge Hoffman) in the Newport News and Norfolk cases distinguished the laws applied in previous Fourth Circuit opinions, according legal significance to the North Carolina and South Carolina

laws. The South Carolina situation had also involved the cut-off of state funds in the event of school integration. The opinion makes the following distinction:

"... One striking distinction appears to exist on its face in considering the laws of these two states. South Carolina has only provided for the cut-off of funds *in the event of a court order* and has not decreed the actual closing of any schools under any circumstances, whereas Virginia took the additional fatal step of providing for the automatic closing of all schools of the same class in the particular political subdivision as well as the cut-off of funds for such schools, irrespective of whether any child was assigned to another school pursuant to an administrative remedy or court order. In so doing, Virginia has exhausted the administrative remedy prior to the commencement thereof.

"... It is sufficient to state that, from a procedural standpoint, the administrative remedy afforded in South Carolina is far less time-consuming and less expensive than Virginia has seen fit to accord to its citizens.

"... the appellate court has held that the Pupil Placement Act of North Carolina is not unconstitutional on its face. North Carolina has not provided for either the automatic closing of any school or the cut-off of state or local funds. Obviously the remedies afforded by North Carolina do not lead to a complete 'blind alley' such as Virginia has prescribed."

The court's opinion includes the following observations pertinent to pupil assignment:

"Nothing herein contained should be construed as automatically granting to plaintiffs the right to enter schools of their choice. ... A local school board may as in years prior to the Brown decision, pass upon individual applications for school changes and, so long as discrimination solely by reason of race does not appear, there is no inherent right of any child to attend any particular school in which children of another race are in attendance. But as long as the school boards maintain an announced policy refusing to consider the application separately and take no steps toward removing the requirement of segregation in the schools which the Supreme Court has held violative of the constitutional rights, there appears to be nothing any court may do other than to enjoin the violation of constitutional rights in the operation of schools by the authorities and, in the event of continued violation, proceed by way of contempt." (See II:58).

The above decision has been affirmed recently by the Fourth Circuit Court of Appeals (II:808).

The Court of Appeals for the Fifth Circuit refused to require any exhaustion of administrative remedies under Louisiana legislation in a case involving the New Orleans schools (II:308). The suit was filed prior to the enactment of the Louisiana pupil assignment law. The court's opinion, nevertheless, deals in some degree with the general problem of exhaustion. It states:

"But assuming that the trial court and we should view this question in the light of conditions after the passage of the 1954 acts, which, however, we do not decide, there is still no merit in appellant's argument. Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students. As patrons of the Orleans Parish school system they were undoubtedly entitled to have the district court pass on their right to seek relief. Jackson v. Rawdon (5 Cir.), 235 F.2d 93, cert. den., 352 U.S. 925, and see School Board of the City of Charlottesville v. Allen, supra.

"Moreover, so long as assignments could be made under the Louisiana constitution and statutes only on a basis of separate schools for white and colored children, to remit each of these minor plaintiffs and thousands of others similarly situated to thousands of administrative hearings before the board for relief that they contend the Supreme Court has held them entitled to, would, as the trial judge said, 'be a vain and useless gesture, unworthy of a court of equity, . . . a travesty in which this court will not participate.' See Adkins v. Newport News School Board, (D.C.E.D.Va), decided 1/11/57, 25 L.W.2317."

Other preventive measures. State laws providing for the possible closing of public schools and the payment of tuition grants for attendance at private schools have been passed in Georgia (I:418, 420), North Carolina (I:928, 930, 934, 938) and Virginia (I:1094, 1097, and 1101). There are no reports of any of these being utilized. The following states have repealed or provided for the suspension of compulsory school attendance laws: Alabama (I:717), Arkansas (II:453), Georgia (II:453), Louisiana (I:728), Mississippi (I:422), North Carolina (I:938) and South Carolina (I:241). Prohibitions against the use of state funds for integrated schools, either absolutely or under certain conditions, are contained in bills passed in Georgia (I:421), Louisiana (I:239), South Carolina (I:241), Virginia (I:1111) and Texas (II:695). These are yet to be tested directly in litigation.

Statutes which seek to utilize the Eleventh Amendment to the Federal Constitution by withholding or limiting consent to suits against the state schools as in Louisiana (I:776) and Virginia (I:1106) have not been effective (II:308 at 311); and compare I:886 at 887. The scope of the Eleventh Amendment has been treated in a background article in the REPORTER (II:757).

D. Affirmative Measures of Resistance.

The foregoing section has outlined certain state legislation, most of which grew out of the recommendations of official commissions to enable the state to provide defenses "in depth" against suits brought to establish school integration in specific localities (I:581, 717, 921, 1077). Other types of state legislation would seem to be more appropriately viewed in the nature of "counter-attacks" or affirmative measures designed more generally to impede or limit movement toward desegregation. The provisions for "state sovereignty" commissions should be classified here. Attacks on the Supreme Court and individual justices through the "interposition" resolutions and otherwise also come under this head, as would the "Southern Manifesto" signed by certain members of Congress (I:435).

Outstanding examples of affirmative resistance are the measures that have been taken, both legislatively and through court action, against the National Association for the Advancement of Colored People. Normally litigation against this organization has proceeded under state laws relating to a foreign corporation doing business in the state, or laws which require the filing of certain information by the foreign corporation or the making of certain tax returns.

The Attorney General of Alabama brought suit in an Alabama state court to enjoin the NAACP as a foreign corporation from doing business in Alabama without registering as a foreign corporation and the appointing an agent for suit. A temporary restraining order was issued against the Association (I:707). Later the state filed a motion for the production of certain books, papers and other documents, including a membership list of the Association. The state trial court ordered the production of the documents and on refusal of the Association to produce, imposed a fine of $100,000 which the Supreme Court of Alabama did not disturb (I:919; II:177). The Supreme Court of the United States has agreed to review this case (II:592).

The Revenue Commissioner of the State of Georgia made a demand on the National Association for the Advancement of Colored People and certain of its officers and employees in Atlanta, Georgia, for the production of certain books, papers and other records. The demand was for the purpose of assessing the tax liability of the Association for several past years. The Association and others were found in contempt and subject to a possible fine of $25,000 for failure at first to produce the papers demanded (II:181).

In Louisiana the state attorney general brought a suit in a state trial court against the National Association for the Advancement of Colored People and certain individuals to enjoin them from conducting any activities in the state because of failure to comply with the Louisiana statute regarding registration and filing of membership lists. A decree was issued and an injunction against the defendants was made final (I:571). Prior to the initial hearing by the Louisiana state court in this case, steps had been taken by the Association to effect a removal of the case to the federal district court. The Association and others sought an injunction in the federal court against further proceedings in the state court. This request was declined, with the observation that if the case were actually removed, the state court is enjoined by operation of law (I:576). On appeal of the

state court decision to the Louisiana Court of Appeal that court held that the case had been effectively removed to the federal district court and therefore the state court had been divested of jurisdiction (II:185).

An effort by the NAACP to secure from the North Carolina courts a declaration that it was not obliged to register under state statutes relating to foreign corporations and organizations influencing legislation and public opinion resulted in a demurrer being sustained against its complaint (I:405; II:448).

The State of Texas brought a bill in a state trial court to restrain the National Association for the Advancement of Colored People, and a number of affiliated organizations, from carrying on certain activities and "doing business" in that state. A temporary injunction was issued, restraining the defendants from carrying on activities in the state and from soliciting contributions or exercising any corporate function or qualifying to do business in the state (I:1068). The court found in this connection that the defendants had unlawfully carried on lobbying and political activities, solicited litigation in the state and had failed to pay franchise taxes. Later the court issued a permanent injunction modifying the temporary one in some respects. Under the permanent injunction the Association is required as a foreign corporation to file certain reports and make payment of franchise taxes; it is permitted to conduct "educational and charitable" activities in the state but is forbidden from engaging in litigation or lobbying. (II:678).

In connection with the above matters it is of interest to note that the Attorney General of the state of New York, where the National Association for the Advancement of Colored People and the NAACP Legal Defense and Educational Fund, Inc., are incorporated, has given an opinion that these organizations can properly be registered under the laws of that state as non-profit organizations (I:1164).

Of the legislation which may be attributed to concern with the activities of the NAACP, only South Carolina seems to have named the organization specifically. Thus Act No. 920 of the Acts and Joint Resolutions of the 1956 Regular Session of the General Assembly of South Carolina provides for an investigation into the activities of the NAACP at the South Carolina State College at Orangeburg (I:600). Act No. 741 of the same session prohibits the employment by the state of South Carolina or any school district or political subdivision thereof of any member of the NAACP (I:751). This act has now been repealed (II:852), following an action by Negro public school teachers in South Carolina which asked a federal court to declare the statute unconstitutional (II:378). A three-judge district court stayed the proceedings pending exhaustion of state administrative and judicial remedies. Each of the three judges filed a separate opinion. The Supreme Court of the United States, after granting review, later dismissed the case as moot in light of the repeal of the above statute (II:777). South Carolina has now passed a statute requiring affidavits as to organization membership from teachers, comparable to the Mississippi statute (I:425).

A number of statutes have been enacted defining and providing punishment for the crime of barratry. The crime is usually defined as the fomenting, soliciting or inciting of litigation. The enactment of barratry statutes has been reported in Georgia (II:501); Mississippi (I:451); South Carolina (II:502) and Tennessee (II:503). Comparable legislation exists in Virginia. In this connection the report of a committee of the Louisiana Bar Association against two Louisiana attorneys involved in the filing of public school litigation is of interest (I:275).

Two Tennessee statutes are designed to require the registration and filing of information by organizations who might participate in desegregation litigation. Chapter No. 151, Public Acts of the 1957 Tennessee General Assembly requires the registration of all persons, associations and others who engage "as one of its principal functions or activities in the promoting or proposing in any manner the passage of legislation . . . in behalf of or in opposition to any race or color or whose activities cause or tend to cause racial conflict or violence" or who participate in raising funds for litigation on behalf of any race (II:498). Chapter No. 152, passed at the same session, requires the filing of information, including membership lists and lists of donors, by those who solicit funds to finance or maintain litigation (II:497). Arkansas has an even broader requirement for reporting by organizations promoting desegregation (II:495). These reporting requirements are at times tied to the activities of a "state sovereignty commission" as in Arkansas, or provide a basis for in-

vestigating committees of the state legislatures. Local ordinances regulating the solicitation of organization membership may be part of the same pattern (I:958).

Numerous other state enactments have been passed which were asserted to be of use to the states in preventing school integration. At times the asserted connection does not appear on the surface, as for example, in the case of the Mississippi law which abolishes the validity of common law marriages (I:434). Some of the laws relate to powers over teacher selection, removal and retirement, as in Florida (I:940), Georgia (I:424; II:456), Louisiana (I:941, 942, 943, 944) and Virginia (I:1097, 1098). A Georgia statute requires the enforcement of segregation by all state officers (I:450).

Several Louisiana statutes provide for the removal of permanent teachers or school employees on the basis of membership in any organization prohibited from operation in the state by law or injunction [thought to be applicable at the time to the NAACP] (I:941, 942, 943, 944). In addition, advocacy of integration of the races in public schools or institutions of higher learning was specified as a basis for removal of teachers and school employees. These statutes were later made the basis for a federal court holding unconstitutional another statute (I:730) which provides additional requirements for admission of students to publicly-financed institutions of higher learning in the state, including a certificate of good moral character to be furnished by local school officials. The court found that the acts violated the Equal Protection Clause of the Fourteenth Amendment because of the required discrimination against Negro citizens (II:600).

III. Education—Colleges and Universities

The application of the principle of the original *School Segregation Cases* to graduate and professional work in state universities was made clear by action taken within a week in cases involving admission to the College of Law of the University of Florida and the law school of Louisiana State University, on May 24, 1954 (I:13, 14). The Florida College of Law case in its subsequent developments has also served to illustrate the application of the 1955 Supreme Court decision to the field of graduate and professional work. In the Florida case, Hawkins, a Negro, commenced an action in 1949 seeking by writ of mandamus to require his admission to the College of Law of the University of Florida. The Florida Supreme Court in 1952 dismissed the action. The United States Supreme Court remanded the case for reconsideration in May of 1954, as cited previously. On the remand the Supreme Court of Florida in effect continued it, pending findings on questions of capacity, plant and other "conditions that now prevail" at the University (I:89). When the Supreme Court of the United States reviewed this action, it entered a new order in the case, after recalling and vacating its prior order. The new order stated that the factors of possible delay in applying to the university law school the principles of the *School Segregation Cases*, recognized in the 1955 implementation decision, were not applicable to graduate professional schools. The Supreme Court of the United States indicated that the applicant was entitled to "prompt admission" (I:297). The applicant asked the Florida Supreme Court for a writ of mandamus requiring his immediate admission to the school of law. By a divided vote the court refused to grant the writ. The court found that the admission of a Negro to the University of Florida school of law in March, 1957, would lead to "violence in University communities and a critical disruption of the University system." The dissenting justices were of the opinion that the mandate of the United States Supreme Court should be obeyed (II:358).

In the Louisiana case the Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court which had enjoined officials of Louisiana State University from refusing admission to a Negro (I:101).

A case tried in the United States District Court for the Northern District of Georgia involved an application for admission to the University of Georgia school of law. In this case, the Negro applicant had filed his application in 1950. After its refusal, he filed an action in federal district court in 1952 to enjoin university officials from denying him admission solely on the basis of

race or color. The federal district court, in February, 1957, after delays occasioned by military service and other reasons, dismissed the case because the applicant had failed to renew his application and to furnish prescribed character information and had enrolled in another law school (II:369). The same court subsequently denied the motion of the applicant which sought to have the court retain jurisdiction of the case pending his application for admission to the school of law of the University of Georgia as a transfer student (II:599).

Cases involving the admission of Negro applicants to the regular undergraduate departments of state colleges and universities have arisen in Alabama, Louisiana, North Carolina, Tennessee and Texas. Action by the Supreme Court of the United States on this point is best indicated by the case involving the University of North Carolina. In this instance Negro youths brought a class action seeking a declaration of the invalidity of orders of the Board of Trustees of the University of North Carolina, which denied the plaintiffs admission to undergraduate schools of the University on the basis of race and color. The three-judge court held that the principle of the *School Segregation Cases* was applicable to colleges as well as to primary schools and ordered the admission of the applicants without discrimination on the basis of race or color, (I:115). The United States Supreme Court affirmed this action by per curiam order (I:298).

The *Lucy* case at the University of Alabama resulted in a series of court actions. The federal district court first enjoined officials of the University of Alabama from refusing admission to Negro applicants on the basis of race or color (I:85). This order was affirmed by the United States Court of Appeals for the Fifth Circuit (I:88) and the Supreme Court of the United States denied certiorari (I:643). Because of disturbances which accompanied the admission to the University of one of the applicants, she was temporarily excluded from the University. She then moved that the defendant officials be held in contempt of court. The United States District Court refused to grant a contempt citation, holding that the action taken by the defendant university officials to exclude her was in good faith for her protection. The court then ordered her re-admission to the University (I:323). Prior to her readmission to the University the trustees took action to expel her permanently because of charges in her court pleadings (I:456). Autherine Lucy then moved the court to amend its previous order so as to require her admission to the University, beginning with the September, 1956, term. The court declined to amend, stating that the Board of Trustees of the state university had authority to expel the plaintiff for just cause and there should be no interference by the court except upon appropriate proceedings and upon a clear showing of deprivation of constitutional rights (I:894). Later the court found that the Board had not exercised its authority to expel arbitrarily on the basis of race or color and denied the motion for a contempt citation against the university officials (II:350).

In the case involving admission to Memphis State College in Tennessee, Negro applicants brought an action in federal district court to enjoin the Tennessee Board of Education and other college officials from denying them admission on the basis of race or color. The state board had adopted a plan calling for admission to state-supported colleges on a racially nondiscriminatory basis over a five-year period, beginning with graduate schools and desegregating the next lower class each year (I:262). The federal district court refused to convene a three-judge court and at the trial on the merits accepted the plan as good faith compliance with the decision of the United States Supreme Court (I:118). On appeal the Court of Appeals for the Sixth Circuit reversed and remanded.

The Sixth Circuit Court of Appeals held that, when equally pertinent to white applicants, the reasons given for delay of admission to Negroes were racially discriminatory and not sufficient to justify a delay of up to five years in light of the announced requirement for "all deliberate speed" (II:64). The Supreme Court of the United States has refused to interfere with this decision of the Sixth Circuit (II:592). A suit filed in the Chancery Court of Davidson County, Tennessee, was also related to the action of the Tennessee State Board of Education in adopting the resolution providing for gradual desegregation of certain state colleges. In this instance, plaintiffs as citizens and taxpayers of the State of Tennessee asked for a declaration that the State Commissioner of Education and other state officials had no authority to disburse appropriations for the support of state colleges and universities which did not comply with the constitutional and

statutory provisions of the state requiring racial segregation in public educational institutions. The Chancery Court denied the relief sought by the plaintiffs and held that the appropriations for educational institutions were made by the legislature in light of the decision of the United States Supreme Court in the *School Segregation Cases*. Thus the legislature was deemed to have impliedly authorized the use of such appropriations in non-segregated institutions (I:523).

Three cases involving state colleges and junior colleges in Texas have each resulted in the requirement that officials not bar Negro applicants on the basis of race. One injunction action related to North Texas State College (I:323). Another granted injunctive relief with respect to Texas Western College of the University of Texas (I:324). A case against Texarkana Junior College had been dismissed by the United States District Court. However, the Court of Appeals for the Fifth Circuit, applying the doctrine of the *School Segregation Cases*, held that Negroes, if otherwise qualified, might not be denied admission to the college solely on account of race (I:122).

Reference has already been made to the effect of state legislation in Louisiana imposing, among other things, the requirement for a certificate of eligibility and good moral character to be furnished by county school officials, *supra*, page 894. Three separate cases were filed in the United States District Court in Louisiana by Negroes seeking admission to colleges and universities in that state. In each case the applicant sought to enjoin the enforcement of the act requiring a certificate of good moral character, asserting in each case his inability, solely because of his race, to secure such a certificate. A preliminary injunction was granted in each case (II:378). The cases were consolidated for a decision and the two federal district judges found the legislation in question to be a violation of the Equal Protection Clause of the Fourteenth Amendment (II:600).

IV. Education—Miscellaneous

Private schools. In the *Girard College Case*, mentioned previously, the Supreme Court of the United States applied the principle of the *School Segregation Cases* to the operation of a "college" supported by funds supplied under the will of Girard who died in 1831. In his will, Girard had established a trust for the education of "poor white male orphans." He desired that the City of Philadelphia act as trustee and in time The Board of Directors of City Trusts for the City of Philadelphia was created by the Pennsylvania legislature and given the function of administering the trust in question, among others, The Board of Directors of City Trusts for the City of Philadelphia consists in part of elected officials of the city and members appointed by the judges of courts of common pleas of Philadelphia County. Negro boys applied for admission to Girard College in 1954. Their application was refused because they were not "white." These rejected Negro applicants filed a petition in Orphans Court, claiming that the limitation to "white" persons was invalid. The Orphans Court found that the operation of Girard College by the Board of Directors of City Trusts pursuant to the terms of the will was not "state action" prohibited by the Fourteenth Amendment to the United States Constitution and that, therefore, the decision in the *School Segregation Cases* was not applicable (I:325, 340). The Supreme Court of Pennsylvania, one justice dissenting, affirmed (II:68). The United States Supreme Court reversed and remanded the case for further proceedings not inconsistent with its opinion.

The per curiam opinion of the Supreme Court states that "the board which operates Girard College is an agency of the State of Pennsylvania [and] . . . its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the state . . . forbidden by the Fourteenth Amendment." (II:591). Whether this action of the Supreme Court of the United States means that a charitable trust, such as that created under Girard's will, may not be administered on the basis of racial distinctions, or whether it merely means that such an agency of government may not administer racially discriminatory trust provisions remains for determination. The Pennsylvania courts had previously assumed that, if the Board of Directors of City Trusts could not carry out

the terms of Girard's will, the courts would substitute a trustee who could carry out the terms. There is nothing in the Supreme Court's opinion which expressly precludes this latter possibility nor in the mandate to the Supreme Court of Pennsylvania (II:811). Such substitution has now been ordered by the trial court.

School bonds. There have been a number of cases in which the validity of school bonds has been questioned because of the use of proceeds for segregated school facilities. In each instance, the court has reached the conclusion that the racial segregation question was not material to the validity of the bonds. This result was reached in Florida (I:124; 527), North Carolina (I:658, 662, 664), Oklahoma (I:136) and Virginia (I:666). The Attorney General of Virginia has also issued an opinion that public funds might be validly expended for the construction of school facilities designed for racially segregated use (II:745).

Teachers. Cases affecting public school teachers have arisen during the survey period in Alabama (I:138), Arizona (I:895) and South Carolina (II:378). The latter case involved the South Carolina statute making unlawful employment by any school district of a member of the National Association for the Advancement of Colored People to which reference has been made, *supra*, page 893. The statute has been subsequently repealed, thus preventing a determination of its validity by the Supreme Court of the United States (II:777). Legislation which deals with organization membership by public school teachers has been enacted in Louisiana (I:941, 942) and South Carolina (I:751; II:852).

The Attorney General of Kentucky was asked for an opinion concerning the assignment of Negro teachers following the integration of schools in Newport, Kentucky. In his opinion he suggested the possibility of a test case to determine the present status of Kentucky statutes relating to tenure and assignment of teachers as applied to the integrated system (I:801).

School taxes. A problem somewhat comparable to that of teacher tenure was presented in Delaware with respect to school taxes. In April, 1957, the Attorney General of Delaware declared that in any school district all taxables, regardless of the race or color of the owner, must be included in preparing the assessment list but that the problems of school redistricting must be resolved by the legislature (II:743). In Oklahoma a railroad company sought unsuccessfully to recover taxes paid under protest utilizing a racial angle; claiming that a "majority" Negro school district had been annexed by a "minority" white school district in violation of state law, thus affecting the school taxes (II:405).

V. Governmental Facilities (Other than Schools)

Public schools and state colleges and universities represent governmental education facilities, usually both publicly-owned and operated. The principle of the *School Segregation Cases* is not necessarily dependent on government ownership in a complete sense. This is illustrated by the Philadelphia *Girard College Case* discussed above (see I:325, 340; II:68, 591). The various levels of government own or operate many facilities other than educational. A point of developing interest is the application of the principle of the *School Segregation Cases* to these other governmental facilities. The Supreme Court has made it clear that compulsory segregation on city golf courses and in state and local parks and bathing beaches is unconstitutional as contrary to the Equal Protection Clause of the Fourteenth Amendment (I:14, 15). The Court of Appeals of Kentucky has said that by these actions the "separate but equal" doctrine has been overruled insofar as public [i.e., governmentally-owned] recreational facilities are concerned (I:162).

Golf Courses. The right of Negroes to use municipal golf courses on a non-segregated basis has been sustained with respect to the cities of Pensacola, Florida (I:681); Ft. Lauderdale, Florida (II:409); Miami, Florida (II:603); Atlanta, Georgia (I:14, 150); Greensboro, North Carolina (II:605); Nashville, Tennessee (I:346) and Portsmouth, Virginia (I:1059; II:609).

In the case involving the Gillespie Park Golf Course in Greensboro, North Carolina, six Ne-

gro citizens of that city were convicted of criminal trespass in a state court for having attempted to use the golf course without permission of the manager. These convictions have been reversed by the North Carolina Supreme Court on appeal (II:818). The defendants in the criminal case, together with other Negroes, brought an action in the federal district court asking for injunctive and declaratory relief as to their right to use the golf course. The golf course, although owned by the city, had been leased by it to a corporation and the action was brought against the city and the corporate lessee. The city of Greensboro conceded in the case that it could not constitutionally deny Negroes the use of municipal facilities while permitting their use by white persons, but it maintained that the action complained of was that of the lessee of the golf course and not the city. The United States District Court for the Middle District of North Carolina held that the right to use the golf course "cannot be abridged by the lessee; so long as the course is available to some of the citizens as a public park it cannot be lawfully denied to others solely on account of race." The court entered a decree restraining the defendants from discriminating against the plaintiffs or other Negro residents of the city in the use of the course and from disposing of the golf course other than by a bona fide sale (II:605).

Parks. The unconstitutionality of compulsory racial segregation in state and municipal parks was established in federal court actions instituted in Maryland. Negroes in Baltimore, Maryland, brought class actions in the federal court asking for relief against city and state officials with respect to their right to use beaches and bathhouses in publicly-owned parks. The Court of Appeals for the Fourth Circuit reversed the federal district court which had denied relief, and held that the principle of the *School Segregation Cases* applied also to state and local activity in recreational facilities. Therefore the Equal Protection Clause of the Fourteenth Amendment was deemed to prevent the state from invoking its police power to enforce segregation in the use of the facilities (I:162). The Supreme Court of the United States affirmed this decision without opinion (I:15).

Action in line with the foregoing decision has been taken with respect to parks in Louisville, Kentucky (I:162); Charlotte, North Carolina (II:411); Beaumont, Texas (I:169) and the Virginia State Park System (I:171, 530, 1024).

In the Virginia case last referred to, the federal district court granted the injunction against the State Department of Conservation and Development and said that if the park to which access was sought, or a part of it, was leased to private operators, the state must require that there be no discrimination in its operation. This point was not disturbed on appeal by the United States Court of Appeals for the Fourth Circuit.

In connection with the Charlotte, North Carolina, park case, a novel feature of real property law was involved. The owner of real property in North Carolina had conveyed land to a municipal park commission to be used for recreational purposes. The deed included a provision under which the property would revert to the grantor in the event that the property was not "kept, used and maintained for park, playground and/or recreational purposes for use by the white race only." The Charlotte Park Commission brought an action for declaratory judgment with respect to rights and liabilities under the deed if Negroes were permitted access. The state trial court and the Supreme Court of North Carolina found that, if Negroes used the facilities in question, title to the property would revert to the grantor without violation of the Fourteenth Amendment (I:164). The Supreme Court of the United States declined to review the decision of the Supreme Court of North Carolina (I:298). Subsequently, the Charlotte Park Commission acquired the right of reverter from the grantors. The Negroes who sought admission to the golf course in the park on a racially nondiscriminatory basis then renewed their application in a North Carolina state court for an injunction. The Superior Court of Mecklenburg County, North Carolina, granted a permanent injunction against the park commission to prohibit it from refusing the use of the golf course to any person solely on the ground of race or color (II:411).

In South Carolina Negroes asked a federal district court to declare their right to use the facilities of Edisto Beach State Park. The legislature had ordered the state commission to close the park. The federal district court held that, as the park was closed to all races and could be reopened only by an act of the legislature, the case was moot and dismissed the complaint. (I:528). Section 14 of the South Carolina General Appropriations Act for 1956 provides for

the withdrawal from state park officials of authority to admit persons to state parks and continues a requirement for the racially-segregated use of such parks (I:738). Other state legislation designed to prevent desegregation in parks has been passed in Alabama (I:732), Georgia (I:426, 427, 428), Louisiana (I:731) and South Carolina (I:590).

Swimming pools and beaches. During the three-year period, in addition to the Maryland case, the use of municipal bathing facilities was involved in several instances of litigation. Negroes in St. Petersburg, Florida, brought a class action in Florida courts against city officials claiming violation of the Fourteenth Amendment in their exclusion from municipal swimming pools. The city defended on the ground that the operation of the swimming pool and beach was undertaken in a proprietary capacity and was therefore not within the reach of the Fourteenth Amendment. The federal district court held that the Fourteenth Amendment prohibited racial discrimination by the city in any capacity and issued an injunction restraining the city from refusing to allow Negroes to use the municipal pool or beach (I:531). The Court of Appeals for the Fifth Circuit affirmed, (II:119). The Supreme Court of the United States declined to review this decision (II:300).

Another Florida swimming pool case, an action against the city of Delray Beach, Florida, was dismissed without prejudice when the city stated that it did not practice racial segregation at the beach facilities (I:680). Subsequently, the city of Delray Beach adopted a series of emergency ordinances with respect to the use by Negroes of the municipal beach and swimming pool (I:733). These were apparently designed to maintain racial segregation in the use of the municipal beaches.

In a California case a plaintiff brought an action in the state court against the city of South Pasadena alleging that she was illegally denied admission to a city swimming pool solely on the basis of her race or color. The California state court found that at the time in question a valid rule of the city department of recreation limited the use of the swimming pool to city residents and that plaintiff was not a resident of the city. Accordingly, the action was dismissed (I:897). In Kansas, a Negro brought a proceeding for a writ of mandamus in the Supreme Court of Kansas asking that the city commissioners of the city of Parsons be directed to desist from denying the plaintiff admission to a municipal swimming pool because of his race. The Supreme Court of Kansas issued the writ (I:177).

Restaurants. Negroes in Harris County, Texas, brought an action in federal district court to restrain county officials and the lessee of a restaurant operated in the county courthouse from denying service in the restaurant to Negroes. The defense was that the restaurant was leased to a private individual for operation and that the lessee could legally restrict his service if he pleased. The federal district court held that the county, having undertaken to furnish eating facilities, must by reason of the Equal Protection Clause of the Fourteenth Amendment, afford substantially equal facilities for all persons, regardless of race or color. The lessee's operation of the restaurant in the county courthouse was considered governmental action and thus the lessee was under a duty not to exclude prospective patrons solely on the basis of race or color (I:532). The Court of Appeals for the Fifth Circuit affirmed this decision, holding that the acts of the lessee in operating the restaurant were as much "state action" as if the county itself were the operator (II:117). The Supreme Court of the United States declined review of this decision (II:300).

Housing. A problem of major interest in all portions of the country relates to the application of the principle of the *School Segregation Cases* to public housing. The majority of courts passing on the matter have held that a city housing authority which seeks to impose racial segregation in the allocation of public housing units is in violation of the Fourteenth Amendment. The decision of the United States Court of Appeals for the Sixth Circuit in the case involving the Detroit, Michigan, Housing Commission illustrates this holding. In this case a class action was brought by Negro plaintiffs against the Detroit Housing Commission seeking to enjoin segregation practices in the allocation of public housing units. The United States District Court enjoined the Detroit commission from the practices complained of. The Court of Appeals for the Sixth Circuit affirmed and remanded the case with directions for further proceedings in conformity with the decisions

of the United States Supreme Court in the *School Segregation Cases* (I:159).

In a more recent Michigan case, Negroes brought a class action in federal district court involving their right to be admitted to public housing facilities in Benton Harbor without discrimination as to race or color. The court granted the plaintiffs' motion for a summary judgment in this case, holding that under the decision in the *School Segregation Cases* segregation in municipal housing on the basis of race is, per se, a denial of equal protection forbidden by the Fourteenth Amendment (II:611). Similar reliance on the principle of the *School Segregation Cases* occurred in the case against the St. Louis Housing Authority, where an injunction was granted preventing the municipal authority from refusing to rent public housing units to Negroes because of their race or color (I:353).

The merits of the constitutional question discussed above were not reached in a case involving the housing authority in Birmingham, Alabama (II:107). It was reached by a federal district judge in Georgia in a case against the housing authority of the city of Savannah and the Federal Public Housing Administration. In the latter case the court relied upon the cases which followed the "separate but equal" doctrine and found that the public housing projects for Negroes in Savannah were substantially equal in quantity and quality to those constructed for white persons. Accordingly, the relief sought was denied (I:347). On appeal the United States Court of Appeals for the Fifth Circuit reversed in part and sent the case back for trial on the merits. This appellate court held that if all claims of racial discrimination made by the plaintiffs were provable as to the Savannah Housing Authority, then the complaint stated a valid cause of action under the federal Civil Rights Act and should not have been dismissed without a trial on the merits (II:109). The court also stated that the plaintiffs were entitled to a trial on the question of the involvement of the federal Public Housing Administration in racial discrimination.

A condemnation case in Illinois was resisted on the ground that the land was to be used for a segregated public housing project. The Supreme Court of Illinois affirmed the lower court's overruling of this point. It held that the facts did not establish that the project would be operated on a racially segregated basis and that it could not be presumed that the Kankakee County Housing Authority would unlawfully practice such racial discrimination (I:350).

Negro plaintiffs brought an action in a United States District Court in Pennsylvania against Levitt & Sons, Inc., the Federal Housing Authority and the Veterans Administration. The plaintiffs asked for a declaratory judgment and injunctive relief, alleging that the defendant builders of houses, being sold under mortgage insurance granted by the FHA and the VA, had refused to sell houses to plaintiffs solely on the ground of their race or color. The federal district court gave no relief against the builder and held that the FHA and the VA had no duty to prevent discrimination in the sale of houses (I:158).

A few state laws and municipal ordinances have been enacted aimed at preventing discrimination on the basis of race, religion, color or national origin in housing which is "publicly-assisted" or "benefiting from public aid." Such provisions may be found in the laws of Connecticut (II:160); New York (I:739) and Washington (II:461). In Oregon, a housing bill had been proposed which would have prohibited such discrimination. The opinion of the State Attorney General was requested as to the constitutionality of the proposed bill and he replied that it would probably be unconstitutional as discriminatory class legislation (II:746). A case involving the application of the Connecticut statute is discussed below under "Public Accommodations."

VI. Transportation

Two major impacts of the principle of the *School Segregation Cases* are observable in the field of transportation. Under one impact, the federal Interstate Commerce Commission invalidated segregation in interstate railway and bus transportation facilities. The other major impact was the action of federal courts in holding unconstitutional state laws and municipal ordinances requiring racial segregation in local transportation.

Interstate transportation. The invalidation of racial segregation imposed by rule of the carrier upon interstate rail and bus facilities came in two decisions by the federal Interstate Commerce Commission in November, 1955 (I:263, 272). The Supreme Court had held in 1946 that state laws requiring segregated seating of interstate passengers on buses and trains were an unconstitutional burden on interstate commerce. *Morgan v. Virginia,* 328 U.S. 383, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946). Segregation in interstate waiting rooms and in interstate transportation by carrier rule was found by the Interstate Commerce Commission to be a violation of the federal Interstate Commerce Act. Section 3(1) of this statute makes it unlawful for a carrier "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The decision invalidating segregation by an interstate bus company was based upon similar wording in Section 216(d) of the statute. These decisions by the Interstate Commerce Commission interpreted the statute in this manner because of the rejection of *Plessy v. Ferguson* and the general expression of public policy by the Supreme Court of the United States in the *School Segregation Cases.* The Commission took particular notice of the Supreme Court's statement in the District of Columbia case to the effect that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect" (I:270).

Legislation was enacted in certain states for the purpose of attempting to maintain racial segregation in transportation facilities, at least insofar as intrastate commerce was involved. Thus House Bill No. 267 of the General Assembly of Georgia requires common carriers of passengers in intrastate travel to provide separate waiting rooms and other facilities for white and Negro passengers (I:428). This was to be enforced by criminal prosecution (I:429). In Louisiana a statute enacted in 1956 requires common carriers in the state to provide separate waiting rooms and other facilities at stations for white intrastate passengers on the one hand and for Negro intrastate and all interstate passengers on the other (I:741). Similar legislation was enacted in Mississippi (I:430, 431).

Damage suits against interstate bus operators because of alleged racial segregation were filed without success both in federal courts in California (I:179) and before the Interstate Commerce Commission (I:1138). In a suit brought under the Civil Aeronautics Act, the United States Court of Appeals for the Second Circuit reversed a lower federal court (I:178) which had denied damages to Ella Fitzgerald in a suit against Pan-American World Airways. The plaintiff had brought the action for damages in federal district court alleging that the airline had refused permission to travel from Hawaii to Australia because of the race or color of the plaintiff. The Court of Appeals held that the Civil Aeronautics Act created a federal civil right enforceable by a damage suit in the federal courts (I:356). In another development affecting interstate air travel the administrator of the Civil Aeronautics Administration issued an Airports Policy and Procedure Memorandum. This was in explanation of the policy adopted by the Administrator to withhold federal aid airport program funds from developments where racially separated facilities were utilized (I:783).

Local transportation. The decision invalidating segregation on local buses came in November, 1956, in a case arising from Montgomery, Alabama (I:1023). A three-judge federal district court had held a Montgomery ordinance and an Alabama statute unconstitutional because they required racial segregation in seating on public buses (I:669). The action was brought against state and city officials, the company operating local buses in Montgomery and certain of the company's bus drivers. The district court held that enforced segregation of this sort violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, declaring that the doctrine of "separate but equal" as applied to public transportation had been impliedly overruled in the public school cases.

Before the Supreme Court had affirmed the above holding, a considerable volume of litigation both in federal and state courts was in process relating to the operation of buses in Montgomery on a segregated basis. Because of its assumption that the United States Supreme Court had declared such segregation invalid in an earlier decision (I:513), the operators of the local bus transportation system directed its employees to cease enforcement of racial segregation on the Montgomery buses. The city then brought a bill in an Alabama state court to re-

strain the bus company from violating the city ordinance and state law requiring racial segregation. The state court gave the relief requested (I:534). The restraining order against the bus company was subsequently dissolved by the state court, although it took the occasion to express strongly its disagreement with the decisions in the federal courts (II:121).

In litigation related to that above, action was being taken to enjoin the operation of car pools by Negroes in Montgomery who were refusing to use the buses (II:123). Certain Negro citizens sought unsuccessfully in federal district court to enjoin the city's prosecution of car pool operators (II:126). The City Board of Commissioners in Montgomery adopted a series of resolutions curtailing the operations of the city bus lines (II:223). A conviction for violation of city ordinances in this connection was affirmed by the Court of Appeals of Alabama in February, 1957 (II:416). The Birmingham, Alabama, City Commission has taken action in March, 1957, to "reaffirm" the segregation ordinances in that city affecting city buses (II:457).

Other litigation involving segregation in local transportation arose in Florida, South Carolina and Texas. The company operating the city buses in Tallahassee, Florida ceased to require racial segregation on its buses following the decision of the Supreme Court of the United States in the Montgomery case. City officials in Tallahassee, then notified the bus company that noncompliance with the segregation laws would result in revocation of the company's franchise. The city then filed suit in a Florida state court to enjoin the company from failing to enforce the segregation laws and to revoke the franchise upon further refusal (II:135). The bus company then filed in federal court to enjoin further action by the city toward the revocation of the franchise. The federal district court granted a temporary restraining order (II:137).

Criminal proceedings were begun by the city of Tallahassee against a number of Negroes sponsoring the operation of a car pool in that city. The organization engaged in such sponsorship asked a federal district court to enjoin the city from the prosecution of the criminal case and to prevent arrests by city officials in the car pool case. The federal district court refused to grant the injunction requested (II:143). Additional actions by the city commission of Tallahassee and the governor of Florida with respect to the bus situation are set out at II:224 and II:459. A similar refusal by a federal court to interfere with state criminal prosecution in a local bus case is found in a decision of the United States District Court for the Middle District of North Carolina in 1955 (I:357). This particular case involved an attempt to remove the criminal proceeding itself to the federal court.

The erroneous assumption that the Supreme Court of the United States had held specifically that local bus segregation was invalid in April of 1956 grew out of its action with regard to a case arising in South Carolina. In this case a Negro brought an action for damages under the federal Civil Rights Act against an intrastate bus company. The suit was grounded on the action of a bus driver requiring the plaintiff to change her seat in accordance with South Carolina's segregation law. The United States District Court dismissed the case on the ground that the state statute was valid. On appeal the Court of Appeals for the Fourth Circuit reversed, applying the principle of the *School Segregation Cases*. The district court was deemed to have jurisdiction under the Civil Rights Act because the bus company employee was acting under color of state law (I:183). The bus company appealed to the Supreme Court of the United States which dismissed the appeal without opinion except for citing a case which indicated that the appeal was premature because the judgment below was not final (I:513). This was widely interpreted as an approval by the Supreme Court of the merits of the decision by the Court of Appeals.

Later developments in the South Carolina case came when the federal district court on the remand dismissed the action for the second time. The ground given for this second dismissal was that the decision of the federal Court of Appeals could not be made retroactive so as to invalidate the state segregation statute as of the event in question, (I:679). On the second appeal to the Court of Appeals, the decision was again reversed and remanded. The Court of Appeals held that the separate-but-equal doctrine under which the South Carolina statute had been valid was repudiated by the United States Supreme Court in the *School Segregation Cases* prior to the happening of the events complained of in the case. There was, therefore, the court said, no question of retroactive application of its prior

decision in the case (II:144). The Public Service Commission of South Carolina reviewed this litigation in deciding to instruct its counsel to file a brief with the Court of Appeals for the Fourth Circuit (I:1141).

VII. Public Accommodations (Other Than Transportation)

Transportation facilities are places of public accommodation or resort. Usually they are privately-owned facilities rather than publicly [i.e., governmentally] owned, as in the case of public schools and colleges. As noted above, the Interstate Commerce Commission has found racial segregation by carrier rule in interstate transportation facilities to be forbidden by federal statute. The decision of the Supreme Court of the United States in the Montgomery bus case invalidates compulsory racial segregation in the privately-owned local carrier, that is, segregation which is required by state statute or local ordinance. The question remains as to whether the local carrier could continue to impose racial segregation by its own rules if it proceeded entirely independently of the law of the state. While Congressional enactment can reach and prohibit racial discrimination by even private persons, if the regulation is otherwise within the general power of Congress, it must be borne in mind that the Fourteenth Amendment does not prohibit "merely private" racial discrimination. "State action" is required before federal constitutional rights can be claimed. (See the background study at I:613-638). So, in the matter of racial segregation or distinction in the use of places of public accommodation the principal legal developments have been associated with a considerable body of state and local legislation requiring nondiscrimination.

Apart from these non-discrimination laws, there is the question of the validity of state laws requiring racial segregation in the public use of various non-governmental facilities.

There has been a limited consideration of the application of state segregation statutes in the use of facilities other than education and transportation. There have been opinions issued by public officials in Virginia, one of which declared that the state statute requiring racial segregation at "public assemblages" would be applicable to political discussion meetings held in public school buildings under sponsorship of the League of Women Voters (I:1156). The Attorney General of Virginia has, however, rendered an opinion to the effect that the Virginia statute would not be applicable to a meeting of a county council of a Parent-Teachers Association (II:558). A state circuit court in Arlington County, Virginia, declared that, in spite of the ruling in the *School Segregation Cases*, it would be obliged to continue to treat as unlawful the action of a white woman who took a seat in the section of a high school auditorium reserved for Negroes at a political discussion meeting (II:446). On the other hand, courts in Maryland and Texas have considered the principle of the school cases as applicable to all such requirements of segregation by law. The Baltimore City Court has held invalid the rule of a city board under which bars were licensed as "colored" or "white" (I:370). The Texas Court of Civil Appeals held in October, 1954, that the state statute prohibiting mixed boxing violated the Equal Protection Clause of the Fourteenth Amendment (I:229).

The above considerations apart, the right to use places of public accommodation without discrimination normally will rest upon local ordinances and state statutes conferring such rights. Obviously, there will be considerable variation in the wording of such laws and in the provisions for their enforcement. Also, it is apparent that such laws are not likely to be found in those states which have required some degree of segregation of races in schools, on buses and in other situations. Within the three-year period new or strengthened anti-discrimination laws are reported from Michigan (I:946 and see I:1158), Washington (II:461) and Wyoming (II:468). A municipal ordinance enacted in Chicago forbids discrimination on the basis of race, religion, color or ancestry in admission for treatment to hospitals in that city (II:697).

Amusement parks. Litigation with respect

to non-discriminatory admission to amusement parks took place in Nebraska (I:366), Ohio (I:360; 546) and Pennsylvania (I:366). In the Nebraska case, a criminal conviction occurred against a defendant who had denied "the full enjoyment of a place of amusement . . . by reasons by law not applicable to all persons." In the Ohio case, a Negro sought to enjoin an amusement park corporation, alleging a denial to the plaintiff of admission to the park because of his color. The plaintiff relied on an Ohio statute which made it criminal and provided civil damages for a denial of admission to places of public accommodation or amusement. The plaintiff secured a permanent injunction (I:360). An intermediate appellate court reversed and the Supreme Court of Ohio affirmed the reversal, holding that the remedies were governed by the statute and therefore equitable relief by way of injunction was not available (I:546). A similar question was decided to the contrary in a Pennsylvania case where the state statute made it a misdemeanor to refuse admission to a place of public accommodation, resort or amusement solely on the ground of race or color. Negro plaintiffs sought to enjoin the operators of a recreation park in Philadelphia from refusing admission. The Pennsylvania trial court granted the injunction and the Supreme Court of Pennsylvania affirmed, holding that injunctive relief would prevent a multiplicity of suits as well as protect the personal rights secured to the plaintiff under the state statute in question (I:366). A criminal prosecution because of a denial of admission to a bowling alley was upheld in a case in the District of Columbia (I:554).

Hotels, restaurants, etc. The use of hotels, restaurants and taverns was involved in cases arising in California (I:378); Ontario, Canada (I:889); Illinois (I:682); Kansas (I:185); New York (I:379; II:425) and Washington (I:553). Civil damages were recovered against a tavern operator in the Washington case, but a California judgment against a hotel was reversed on appeal because of a procedural defect. There was an acquittal in a criminal case involving an Illinois restaurant owner, but a conviction in an Ontario Magistrate's Court, based on the Ontario Fair Practices Act of 1954. A New York restaurant case involving suit for civil damages was dismissed because plaintiff failed to prove discrimination on the basis of race or color. In the Kansas case the plantiff sued in federal court on the basis of diversity of citizenship, basing his claim on the law of Kansas regarding the furnishing of accommodations without discrimination. The United States Court of Appeals for the Tenth Circuit held that the action was for breach of an express contract, a reservation having been made, and was therefore covered by a three-year statute of limitations rather than the two-year tort action statute. A Negro and his white wife brought suit to recover the statutory penalty under New York Civil Rights Law for having been refused, on account of race, accommodations in defendant's hotel. The court found that the hotel corporation had discriminated against both plaintiffs because of race.

Beach clubs. A case involving the Castle Hill Beach Club in New York resulted in a number of reported decisions. In this case, Negroes first complained against the Castle Hill Beach Club to the New York Commission Against Discrimination, alleging a denial of accommodations at the club because of race. The state commissioner, after hearing, issued a cease and desist order against the club. The club then petitioned a lower state court to annul the order of the Commission on the ground that it was a private club and not a "place of public accommodation" within the terms of the New York statute. The State Commission asked the court in the same proceeding to enforce its order against the club. The court found that the beach club was in fact a place of public accommodation and denied the petition to annul the Commission's order (I:186; 382). New York appellate courts, including finally the Court of Appeals of the State of New York, affirmed the order with some modification (I:682; II:620).

Cemeteries and miscellaneous. The borderline between a public and a private accommodation arose in a number of other reported decisions. In another Canadian case, discrimination in the renting of an apartment was found not to be covered by the Ontario statute (I:1144). A barbershop was treated within the scope of the California statute and $200 damages imposed for refusal to cut plaintiff's hair (II:421). A reducing salon fell within the Washington Public Accommodations Law (II:618), and plaintiffs were awarded $750 in damages.

California courts have found both cemeteries (I:184) and dentists' offices (II:423) not to be places of "public accommodation or amusement."

A much more significant legal problem was presented in a cemetery case which went to the Supreme Court of the United States with an inconclusive result. A Sioux City, Iowa, cemetery operated by a private corporation refused to allow an American Indian to be buried in a lot purchased by the plaintiff widow. The plaintiff sued in a state court for damages without relying on any statutory provision against discrimination. The cemetery relied on its contract with plaintiff that permitted burial only of members of the Caucasian race. The Iowa Supreme Court upheld the validity of the contract as worded. The United States Supreme Court granted certiorari, and, by an evenly divided court, affirmed the Iowa Supreme Court without opinion. On rehearing, the Supreme Court of the United States, three justices dissenting, held that, as the Iowa legislature had enacted legislation that would prevent future cases of this nature from arising in Iowa, the issue presented by the petitioner was not of such public concern as to warrant review by the highest court. (I:15).

In a Connecticut case (II:160) complaint of discrimination by the lessors of privately-built apartment houses was filed with the State Commission on Civil Rights. The Connecticut statute forbids discrimination on account of race or color in "public housing projects and all other forms of publicly-assisted housing." The Superior Court of Hartford, Connecticut, in reviewing the cease and desist order issued by the Commission, found that there was insufficient evidence to permit a determination by the Commission. It ordered the complaint dismissed, therefore, without reaching the question of the statutory coverage (II:160).

Enforcement techniques in connection with these state statutes include the possibility of revocation of the licenses of violators, under the Michigan statute (I:1158), and deletions from lists of state-approved hotels and resorts (I:802, 988). The Attorney General of Vermont was asked for an opinion with respect to the deletion of names of hotels and related places of public accommodation from various state listings if racial discrimination were practiced. His opinion expresses the view that discrimination on the basis of race by places of public accommodation is violative of the common law relating to innkeepers (I:802).

VIII. Housing and Real Property

The question of governmentally-owned or operated housing has been discussed above, in the section dealing with governmental facilities, (*Supra*, page 899). The extent to which the concept of state action will extend to prevent racial discrimination in housing other than that which is governmentally-owned or operated has not presented itself in any important litigation during the three-year period. (See I:613-638). The important Supreme Court decisions rendering racially restrictive covenants unenforceable in state courts came in *Shelley v. Kraemer*, in 1948, and in *Barrows v. Jackson*, in 1953. There were applications of the principles of these two cases during the three-year survey period in Arizona (II:445), Colorado (II:200) and Utah (I:199). In the Arizona case the Negro plaintiffs, as owners of certain real property, brought an action in state courts to quiet title to that property. It was alleged that defendants as prior owners had filed a "declaration of establishment of conditions" on the sale or lease of the property which purported to establish a right of reversion to the prior owner in the event of the sale or leasing to "any person of African or Negroid descent." The plaintiffs claimed that the enforcement or legal recognition of the declaration would effect a forfeiture of title or ownership, in violation of the Constitution of the United States and of Arizona. The court entered a judgment in favor of the plaintiffs. The Colorado case was also brought by Negro plaintiffs to quiet title to property acquired under deed with a racially restrictive covenant. Enforcement of the covenant was to be by suit by other property owners for damages for specific performance. The Colorado state court adjudged the restrictive covenant to be void and not enforceable (II:200). The decision of the Supreme Court of North Carolina to the effect

that a right of reverter based upon a racially-restrictive use could be made effective without any invalidating "state action" was discussed in connection with parks. (*Supra*, page 898).

During the three-year period the Alien Land Law of Montana was declared unconstitutional (I:199). In this case the state of Montana brought an action in a state district court for a declaratory judgment that certain real property which had been owned by a Japanese national and devised by him to his son, also a Japanese national, had escheated upon his death to the state under the provisions of its Alien Land Law. The lower state court held the law to be unconstitutional under both United States and Montana constitutions. The Supreme Court of Montana affirmed the judgment. The California Alien Land Law was repealed by an initiative measure at the 1956 general election (I:1118).

Reference has been made to the state and local laws which seek to eliminate racial discrimination in securing "publicly-assisted housing." (*Supra*, page 900). A notable example of this type of legislation is the Law Against Discrimination enacted in the state of Washington in 1957 (II:461). Section 15 of this Washington statute makes it an unfair practice for the owner of publicly-assisted housing to segregate in the use of or refuse to sell, rent or lease to any person because of "race, creed, color or national origin." The statute in Section 4 defines "publicly-assisted housing" as:

> "... includes any building, structure or portion thereof which is used, or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof."

The legality of comparable legislation has been questioned by the Attorney General of Oregon (II:746) as well as in litigation which is pending in New York. It was involved but not discussed in a Connecticut court decision (II:160).

IX. Employment

Federal law. A major development in federal law during the three-year period came in November, 1955, in the application to labor unions holding certifications under the National Labor Relations Act (Taft-Hartley) of the same obligation of non-discriminatory use of bargaining power as had previously been applied to such organizations under the Railway Labor Act (I:20). In this case Negro members of a segregated local union in Texas sued an "all white" local union to enjoin the enforcement of certain collective bargaining contract provisions. The white union had negotiated the contract with an oil company both for itself and for members of the Negro union. The contract established two lines of seniority, based on race. The Court of Appeals for the Fifth Circuit held that the federal district court did not have jurisdiction since there was no diversity of citizenship and only the construction of a private contract was involved (I:192). The United States Supreme Court reversed this decision and remanded it for further proceedings, citing cases arising under the Railway Labor Act that had established federal jurisdiction over the rights claimed because of the status accorded labor organizations under federal statutes (I:19). All of the other court decisions during the three-year period represent railway labor cases with the exception of another case against the Oilworkers

International Union filed in a state court in Texas (I:192). In this case Negro employees of an oil company brought a class action against a local union and the parent union, alleging racial discrimination in collective agreements obtained by the union as a certified bargaining agent. Prior to a hearing on the merits, representatives of the union and the company, together with a representative of the President's Committee on Government Contracts, arrived at an amendment to the collective bargaining agreement which removed the alleged racial discrimination to the satisfaction of the plaintiffs. The suit was then dismissed.

The principle which seems to have been established in these cases is that a labor union which has been given the status of exclusive bargaining agent under federal statute cannot use that bargaining power to negotiate a racially discriminatory contract. None of the cases following this general line involve any requirement to admit Negroes to membership in the union possessing the bargaining rights. The point seems to be that of requiring non-discriminatory representation or treatment of Negroes (whether in or out of the bargaining unit), because the certified union cannot discriminate on a racial basis any more than government itself could validly do so. The application of this principle has been presented in cases involving various railroad brotherhoods and the Texas and New Orleans Railway (I:556, 561; II:643), the Central of Georgia Railway (I:192; 558), the Chesapeake & Ohio Railway (I:384) and the Southern Pacific Railway (I:191).

A point of contention in the railway labor cases is the question of primary jurisdiction in the administrative dispute procedures set out in the Railway Labor Act. The latest decision in this respect is that of the United States Court of Appeals for the Fifth Circuit (II:157). In this case, Negro employees of the Texas & New Orleans Railroad Company brought a class action in federal district court against the company, the Brotherhood of Railroad Trainmen and local officials of the brotherhood. The plaintiffs stated that a pre-existing practice of discrimination against Negro employees of the railroad was being perpetuated in the application of the collective bargaining agreement entered into between the railroad and the brotherhood. The federal district court found that the suit involved the interpretation of collective bargaining agreements as to which primary jurisdication was in the National Railroad Adjustment Board (I:561). The Court of Appeals for the Fifth Circuit reversed and remanded, holding that primary jurisdiction to consider cases of this nature does not rest in the administrative agency when discrimination appears upon the face of the contract or where it results from the discriminatory application of an otherwise valid contract (II:643).

Another railroad case involving labor union representation questioned discrimination in pay by a railroad during the pendency of a reorganization in bankruptcy (II:157). The Negro plaintiff sought to intervene in the reorganization proceedings and assert his claim against the Missouri-Pacific Railroad Company and the Trustee in Bankruptcy for that railroad. The Court of Appeals for the Eighth Circuit did not interfere with the trial court's refusal of the application to intervene.

Other action related to federal law in connection with employment centered mostly around the activity of the President's Committee on Government Contracts. The Third Annual Report of this committee was submitted in October, 1956 (I:1149). This sets forth executive orders under which the committee operates and reviews principal action taken which is not of the sort to be involved in litigation. Other action of this committee is reported at II:721 and II:722. There is also a President's Committee on Government Employment Policy which operates to implement the executive order establishing equal opportunity to all persons regardless of race, color, religion or national origin in employment with the federal government. The Equality of Opportunity Regulations and Procedures adopted by the President's committee are set out at I:784. The first report of this Committee appears at II:249. Also at the federal level it may be noted that the Congress acted in May, 1956, to terminate the prohibition against the employment of Mongolian labor in reclamation projects (I:753).

Fair Employment laws. There were a number of state and local laws and ordinances forbidding racial discrimination by employers and labor unions enacted during the three-year period. Consideration of the enactment of such fair employment laws has taken place in still additional states. Laws were enacted as original legislation or as amendments to existing legis-

lation in: Colorado (II:697), Michigan (I:457), Pennsylvania (I:247) and Washington (II:461) and in the following cities, among others: Des Moines, Iowa (II:225); St. Paul, Minnesota (II:702); Baltimore, Maryland (I:1113); St. Louis, Missouri (II:468); Pittsburgh, Pennsylvania (I:746) and Braddock, Pennsylvania (I:742). Special studies of discrimination in employment made by official commissions are reported from Illinois (II:515), Iowa (II:520), Kansas (II:526), Massachusetts (II:531), Michigan (I:457), Minnesota (II:535), New Mexico (II:539), Oregon (II:551) and Washington (II:553), as well as by city commissions in Fresno, California (II:512) and Erie, Pennsylvania (II:721). Cases involving the application of fair employment laws have been reported from Minnesota (II:625), New Jersey (II:237) and New York (I:685, 971; II:542, 627).

There is considerable variety in the provisions of the fair employment statutes and ordinances both in their substantive terms and in the measures which are available for their enforcement. Almost all statutes depend largely upon possibilities of conciliation and persuasion, but some definitely provide "teeth" against the employer or labor union which discriminates on the basis of race, color, creed or national origin. A case against a labor union in Wisconsin illustrates a statute without ultimate enforcement provisions (II:151).

Two Negro bricklayers in Wisconsin brought a complaint before the Industrial Commission of that state against the bricklayers local union alleging that they had been refused membership because of their race. The state commission, after hearing, found that discrimination had been practiced and recommended that the union admit the two persons to membership. The complainants then filed an action in Wisconsin state court seeking to require their admission to the union on the basis of the findings and recommendations of the Commission. The court held that the recommendations of the Commission were not judicially enforceable under the terms of the statute and that there was no constitutional right to be admitted to the union (II:151). The Wisconsin Supreme Court affirmed, holding that the action of the union was not "state action" so as to involve rights under the Fourteenth Amendment and that the plaintiffs had obtained all the relief to which the Wisconsin statute entitled them (II:648).

Another case involved refusal of membership to a Negro by a local electrical workers union in Cleveland, Ohio. The City of Cleveland Community Relations Board found the complaint of discrimination to be established and ordered the union to cease from denying the complainants membership because of race (I:979).

X. Court Procedures

There have been no novel developments during the three-year survey period of legal principles in the area of court procedures. There have been a number of cases applying established principles, particularly those which invalidate racial discrimination in the selection of grand and trial juries. There is an unbroken chain of court decisions which have declared that a defendant in a criminal case both in the federal and state courts has a right to be free from the systematic exclusion of members of his race from the grand jury which indicts him or the trial jury which might try him. One Kentucky jury case during the period does vary from this pattern to raise the question of the right of a Negro to serve on the jury (I:702). In this case a Negro plaintiff in Kentucky, qualified for jury service, brought suit for an injunction in federal court against state jury commissioners and the county sheriff to restrain the continuation of a practice of racial discrimination in the selection of state court grand and petit jurors. The federal district judge found that such a practice of racial discrimination had existed and that the plaintiff was entitled to an injunction.

With respect to systematic exclusion from the grand jury, the Supreme Court did classify the matter of waiver in some degree in two cases decided in December, 1955 (I:20, 23). In each case it was alleged that the Negro defendant had been denied due process of law because of systematic exclusion of Negroes from the grand jury. In the case arising in Georgia the

state maintained that the defendant had not made a timely objection before indictment, as required by Georgia practice. The United States Supreme Court reversed, holding the applicability of the Georgia rule of practice to the accused, a semi-literate Negro who had not been afforded counsel before his indictment, violated the Due Process Clause of the Fourteenth Amendment. In the Louisiana case, against a similar claim, the Supreme Court affirmed the conviction of the defendant Negroes, holding that they had waived their constitutional rights since they had a reasonable opportunity after being provided counsel to raise their objections to the grand jury in a timely fashion.

There were reports during the survey period of state court decisions from the following states, in each of which it was found that there had been no systematic exclusion from the grand or trial juries, as the case might be: Alabama (I:200, 697), Arkansas (II:171), California (I:203; II:655), Mississippi (I:565; II:438) and Texas (I:393). Federal district courts in Indiana (II:656) and Ohio (I:687) concluded in cases before them that there had been no systematic exclusion of Negroes from the grand jury. A similar conclusion was reached in a Texas court where the allegation was that of discrimination against Latin-Americans (I:1059).

In a Tennessee case a criminal defendant appealed his conviction to the Supreme Court of Tennessee, assigning as error that a Negro member of the jury which tried him had been separated from the remaining members of the jury for lunch during the trial. The Tennessee Supreme Court found that the juror's ability to give a fair consideration to the issues being tried was not affected by the separation and that the allegation of discrimination as to the juror could not be considered on appeal (I:401). In Connecticut a Negro in appealing to the Supreme Court of Errors in that state alleged that the trial judge had erred in excluding questions addressed by his attorney to prospective jurors as to their racial bias or prejudice. The Supreme Court of Errors reversed and returned the case for a new trial, holding that the defendant should have been allowed to establish whether prospective jurors entertained any racial bias (I:397).

Racial prejudice in connection with the argument of counsel during the course of a trial was reported in cases from Alabama (I:905), California (II:171), Lousiana (II:654) and New York (II:437). In the Lousiana case the Supreme Court of Louisiana stated that while an appeal to racial prejudice by the prosecuting attorney would be grounds for a mistrial, the criminal defendant must take exception to such remarks at the time of their occurrence, otherwise the failure to object operates as a waiver. In both the California and New York cases, argument which referred to the race or nationality of certain witnesses was not found to be prejudicial to the defendant.

Another aspect of procedure in criminal trials was involved in a criminal case before the Supreme Court of Florida (II:657). In this instance, a Negro convicted of rape in a Florida state court, there being no recommendation for mercy, was sentenced to death. In his appeal to the Florida Supreme Court he alleged denial of his constitutional right to a fair and impartial trial because juries in Florida had systematically refused to recommend mercy toward Negroes convicted of rape while so recommending when the defendant was white. The court found no support for the contention, as well as for other alleged errors, and affirmed the conviction.

XI. Voting

The issue of racial discrimination in connection with voting and other rights associated with elections has been presented in a number of reported legal developments during the three-year period. Most of the cases have treated different aspects of the question of registration. There are three reported cases from Alabama in this regard (I:209, 1064, 1065). In one case Negroes brought suit in the United States District Court against members of the board of registrars of Bullock County, Alabama, seeking relief against a denial of registration on the ground of race or color. The federal court found that certain practices of the County Board of Registrars amounted to racial discrimination and stated that injunctive relief would be granted

should any of the defendants, all of whom had resigned as board members, again become members of that board. The claim for money damages was denied (I:209). The other two Alabama cases relate to the purging of the list of voters of Barbour County, Alabama, of some thirty-two names said to have been illegally registered.

In Georgia, Negroes in Randolph County brought a class action in United States District Court charging county officials had removed their names illegally from the list of registered electors in the county because of their race. The court found that the complaint was justified and enjoined the defendant county officials from removing the plaintiffs' names (I:213). In another case involving Pierce County, Georgia, Negroes brought action in federal district court against county registrars to prevent the removal of their names from the list of voters in the county. The court granted a temporary restraining order but at the trial on the merits it was shown that some of the plaintiffs who had been challenged had not in fact been removed from the voters list. The federal court found that the challenges and hearings thereon had been conducted in accordance with the state law and that no showing had been made of unlawful racial discrimination. Accordingly it refused to grant a permanent injunction (II:163).

Allegations of unlawful discrimination in connection with registration because of the plaintiff's race were made in three cases filed in the United States District Court for the Western District of Louisiana (I:211; II:426, 431). In the most recent case, plaintiff, a Negro, who was a registered voter of Ouachita Parish, Louisiana, had been challenged as illegally registered in April of 1956. The parish registrar of voters had notified the plaintiff as well as a large number of others similarly challenged and had cancelled the registration of the plaintiff when he failed to appear in the allowed time to contest the challenge under Louisiana statute. The plaintiff filed his action in United States District Court against the parish registrar claiming that his registration was challenged solely on the basis of his race. The court found that the complaint did not raise a justiciable issue but merely alleged that the defendant had done what the law required her to do. The court further found that the plaintiff had failed to exhaust the remedies available to him under the Louisiana statute by seeking re-registration and had thus brought his case in court prematurely. In the exercise of its equitable discretion, however, the federal court deferred the granting of a motion for summary judgment for a period of sixty days to permit the plaintiff to request re-registration (II:426).

In another case involving the registrar of Ouachita Parish, Louisiana, the plaintiff, a Negro, claimed that the registrar had injured him in his status as an attorney in the representation of his client. The injury allegedly grew out of the refusal to permit the plaintiff to inspect the registration card of the client in the office of the registrar because the cards of all Negroes whose registration had been challenged were kept in another room. The federal court granted the defendant registrar's motion to dismiss, holding that it did not have jurisdiction of any claim with respect to plaintiff's right to practice law and that the other allegations did not state a valid cause of action (II:431). Extended comments with regard to the registration and purging of voters of Ouachita Parish were made before a Congressional committee by the Attorney General of Louisiana and an Assistant Attorney General of the United States (II:469, 472, 476).

Additional state legislation concerning registration and voting has been reported during the survey period from Mississippi (I:433) and North Carolina (II:706). In the latter situation the North Carolina General Assembly in April, 1957, amended the statutory qualifications for electors in that state to remove the "grandfather clause" which exempts from certain registration requirements any person who was an elector in 1867, and his descendants.

A case with respect to voting rights of American Indians arose in Utah (I:1067, 1160; II:166). In this instance an Indian residing on a reservation in Utah brought a proceeding as a class action in the Utah Supreme Court seeking to require a county clerk to issue him a ballot to permit him to vote. The clerk's refusal to permit the Indian to register and vote was based on the Utah statute which denied the qualification of "resident" to a resident on an Indian reservation. The Supreme Court of Utah held that the statutory requirement was valid, that a separate classification of reservation Indians, with an accompanying limitation of voting rights, was based on reasonable grounds and not a denial

of the right to vote on racial grounds. The Supreme Court of the United States agreed to review this case but it has since been returned to the Supreme Court of Utah as "moot" (II:778).

XII. Conclusion

Obviously this survey has not attempted to cover all of the items reported in RACE RELATIONS LAW REPORTER for the three-year period, even under the headings set forth. To be all-inclusive many additional headings would be needed. For example, the Supreme Court of South Carolina held in February, 1957, that the publication of a statement concerning a white person that he is a Negro is actionable defamation without more (II:443) but the Supreme Court of Georgia found that a white person's petition failed to state a cause of action which complained of the publication of an advertisement by the defendant newspaper in which the realty company offered for sale to colored persons a number of properties, including the plaintiff's (II:205). Reports are included of such diverse items as that of the liability of the city of Chicago for damages resulting from mob violence directed against Negro occupancy of public housing (I:411) and the alteration of a marriage license in Massachusetts (II:667) and of a death certificate in Louisiana (II:669).

The issue of miscegenation was touched upon but not discussed by the Supreme Court of the United States in a case arising in Virginia. In this instance a Chinese and a Caucasian left Virginia for North Carolina to be married in the latter state in order to avoid the Virginia statute prohibiting marriage between persons of these two races. Later a suit for annulment of the marriage was brought in Virginia courts. On appeal the Supreme Court of Appeals of Virginia held that the marriage was void by virtue of Virginia miscegenation statutes (I:219). On appeal to the Supreme Court of the United States, that court held that the constitutional issue of the validity of Virginia statutes was not squarely before it and remanded the case for clarification of the issues with respect to the relationship to the parties to the State of State at the time of the marriage in North Carolina (I:42). On receiving the order on remand the Supreme Court of Appeals of Virginia refused to reopen the case on the ground that there was no provision in Virginia practice for the procedure suggested and adhered to its prior opinion (I:404). When the Supreme Court of the United States was asked to recall its mandate and hear the case on its merits, that court denied the motion on the ground that the action of the Supreme Court of Appeals of Virginia had left the case "devoid of a properly presented federal question." (I:513). South Dakota has repealed the miscegenation statute of that state at the 1957 session of the legislature (II:479), as has Colorado (II:707).

Other cases under the general heading of family relations will be found with respect to adoption in the District of Columbia (I:218) and child custody in Illinois (II:435). Even the question of slave marriages has arisen in litigation decided during the three-year period in a decision by the Supreme Court of Tennessee with respect to property rights (II:658).

This three year survey is largely a reflection of the legal repercussions of the policy change pronounced in Supreme Court decisions against legalized racial segregation. These repercussions at times reflect legislative resistance to the change but frequently they reflect not only acceptance but extension of the new policy into localities and phases of race relations not directly affected by the Supreme Court's actions. The overall result is to make the survey period probably the most significant one in establishing a general tone in this area of the law since the period (between 1873 and 1884) when the Supreme Court also played a major role in establishing race relations law policy through restrictive interpretations of the Fourteenth Amendment and Civil Rights Statutes passed by congress.

BIBLIOGRAPHY

THIS BIBLIOGRAPHY is a supplement to the general bibliographical material appearing in Volume 1 of RACE RELATIONS LAW REPORTER at pages 501-508 (April, 1956) and pages 835-839 (August, 1956) and in Volume 2 at pages 287-292 (February, 1957).

Leading Articles

Amandes, *Jury Challenge in Criminal Cases: When, How and Group Membership Bias as a Basis Therefor,* 3 Wayne L. Rev. 106-23 (1957).
A study of challenges to jurors in criminal cases on the ground of bias, including racial and national prejudice, and of the types of group membership or affiliation that constitute bias.

DeLacy, *The Segregation Cases: A Judicial Problem Judicially Solved,* 43 A.B.A.J. 519-21 (1957).
A re-examination of the doctrine of *Plessy* v. *Ferguson,* concluding that it was not as firmly established in constitutional law as its advocates believe.

Fordham, *In Appreciation of the Supreme Court of the United States,* 28 Pa. B. Q. 253-64 (1957).
An address delivered before the Nineteenth Annual Judicial Conference (September 11, 1956) discussing the role of the United States Supreme Court in upholding the freedom and dignity of the individual and the recent attacks on the Court, including a discussion of interposition.

Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 So. Calif. L. Rev. 208-21 (1957).
An attempt to analyze the extent to which state judicial action and the action of private individuals and organizations will be classified as "state action" under the Fourteenth Amendment, and the constitutionality of such action.

Johnston, *Schools, The Supreme Court, and the States' Power to Direct the Removal of Gunpowder,* 17 Ala. Law. 3-28 (1956).
An address to the Alabama State Bar Association (July 19, 1956) criticizing the *School Segregation Cases* and discussing the function of the federal courts where federal-state relations are involved.

Jones, S. B., *Warning: Was it Justified?,* 43 A.B.A.J. 55-58 (1957).
Argues that the decisions of the Supreme Court of the United States have begun to undermine the rights of the states and consolidate all power in the hands of the federal government.

Jones, W. B., *I Speak for the White Race,* 18 Ala. Law. 201-03 (1957).
Asserts that the white race is being subjected to unwarranted assaults because of its justifiable pride in the role which it has played as leader of the world.

Kenealy, *Segregation—A Challenge to the Legal Profession,* 3 Catholic Law. 37-43 (1957).
An address before the Louisiana Bench and Bar at a Red Mass (October, 1956) discussing the ideals behind the Constitution and their application by the Supreme Court in race relations cases.

Le Breton and Le Breton, *The Michigan State Fair Practices Act,* 34 U. Det. L. J. 337-48 (1957).
A discussion of how the Michigan Fair Employment Practices Act might affect the practices of businessmen, comparing the Michigan act with those of other states.

Leflar, *Legal Education: Desegration in Law Schools,* 43 A.B.A.J. 145-49 (1957).
A report by the former chairman of the Special Committee on Racial Discrimination of the Association of American Law Schools on the progress of integration in law schools, and an explanation of the policy of the Association.

Miller, *Racial Discrimination and Private Schools,* 41 Minn. L. Rev. 145-86, 245-86 (1957).
A treatment, in two installments, of the limitations on the power of the States to regulate private schools and of the private schools to regulate their educational standards, including the effect of the *School Segregation Cases* on private schools.

Pittman, *The Ignoble Proclamation of "100 Lawyers",* 18 Ala. Law. 9-11 (1957).
An article analyzing and criticizing the statement of 100 attorneys in support of the United States Supreme Court [1 Race Rel. L. Rep. 1024].

Shanks, *"State Action" and the Girard Estate Case,* 105 U. Pa. L. Rev. 213-40 (1956).
Analysis of the concept of "state action" under the Fourteenth Amendment, seeking to answer the question whether municipal management of a charitable trust—under the Girard Will—results in state action.

Sutherland, *The American Judiciary and Racial Desegregation,* 20 Modern L. Rev. 201-19 (1957).
An analytical and historical discussion of the role which the federal judiciary has played in the development of the Fourteenth Amendment with regard to racial desegregation, commencing with the *Civil Rights Cases.*

Van Hecke, *Racial Desegregation in the Law Schools,* 9 J. Leg. Educ. 283-89 (1957).
The presidential address to the Annual Meeting of the Association of American Law Schools, discussing the objectives of that Association and the progress which has been made in integration of law schools.

Weinberger, *Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 Cornell L.Q. 208-22 (1957).
A discussion of the validity of miscegenation statutes under the Fourteenth Amendment, concluding that such statutes violate the equal protection clause.

Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner,* 66 Yale L. J. 637-710 (1957).
A judicial biography of Mr. Justice Harlan, emphasizing his advocacy of the rights of Negroes under the Constitution.

Williams, *Impact of the Dred Scott Case,* 14 N.Y. County Bar Bull. 77-81 (1956).
A discussion of recent decisions of the United States Supreme Court on individual liberties, including a survey of decisions on desegregation.

Winter, *Recent Legislation in Mississippi on the School Segregation Problem,* 28 Miss. L. J. 148-55 (1957).
A survey of Mississippi legislation and executive declarations dealing with school integration from 1954 to date.

NOTES AND COMMENTS

Civil Liability of Subordinate State Officials Under the Federal Civil Rights Act and the Doctrine of Official Immunity, 44 Calif. L. Rev. 887-98 (1956).

Civil Liberties and the Supreme Court: October Term, 1955, 16 Law. Guild Rev. 104-25 (1956).

The Common Law and Constitutional Status of Anti-Discrimination Boycotts, 66 Yale L. J. 397-412 (1957).

Denial of Voting Rights to Reservation Indians, 5 Utah L. Rev. 247-56 (1956).

Discrimination against Minorities in the Federal Housing Programs, 31 Ind. L. J. 501-16 (1956).

Effect of Desegregation on Public School Bonds in the Southern States, 10 Vand. L. Rev. 580-91 (1957).

Effect of School Assignments on Federal Adjudication of Integration Controversies, 57 Colum. L. Rev. 537-52 (1957).

The Federal Courts and Indirect Criminal Contempt, 10 Vand. L. Rev. 831-45 (1957).

The Girard Will Case—A Charitable Trust Faces the Fourteenth Amendment, 18 U. Pitt. L. Rev. 620-40 (1957).

Obstacles to Federal Jurisdiction: New Barriers to Non-Segregated Public Education in Old Forms, 104 U. Pa. L. Rev. 974-97 (1956).

Racial Residential Segregation—Dead or Alive?, 29 Rocky Mt. L. Rev. 223-31 (1957).

Recent Trends Curtailing the Summary Contempt Power in the Federal Courts, 8 Hastings L. J. 56-63 (1956).

State Control over Political Organizations: First Amendment Checks on Powers of Regulation, 66 Yale L. J. 545-66 (1957).

RECENT CASES

Brewer v. Hoxie School District, 238 F.2d 91, 1 Race Rel. L. Rep. 1027 (8th Cir. 1956). A federal district court may enjoin individuals and organizations from interfering with a school board in its efforts to operate schools on a racially non-discriminatory basis.
70 Harv. L. Rev. 1299 (1957).
43 Va. L. Rev. 255 (1957).

Browder v. Gayle, 142 F.Supp. 707, 1 Race Rel. L. Rep. 669, 678 (M.D. Ala. 1956). Segregation on public transportation violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.
37 Bost. U. L. Rev. 137 (1957).

Covington v. Montgomery County School Board, 139 F.Supp. 161, 1 Race Rel. L. Rep. 516 (M.D. N.C. 1956). A three-judge federal court is unnecessary in an action to restrain the enforcement of state statutes which are clearly unconstitutional in the light of the recent Supreme Court decisions.
70 Harv. L. Rev. 1103 (1957).

Derrington v. Plummer, 240 F.2d 922, 2 Race Rel. L. Rep. 117 (5th Cir. 1956), *cert. denied,* 77 S.Ct. 680, 2 Race Rel. L. Rep. 300 (1957). Operators of restaurant in county courthouse ordered not to refuse to serve Negroes.
43 Va. L. Rev. 725 (1957).

Fitzgerald v. Pan American World Airways, 229 F.2d 499, 1 Race Rel. L. Rep. 356 (2d Cir. 1956). Civil Aeronautics Act held to create a federal civil right enforceable in the federal courts.
31 N.Y.U.L. Rev. 1323 (1956).

Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 134 N.E.2d 371, 1 Race Rel. L. Rep. 546 (1956). A statute prescribing remedies and penalties for excluding a person from a place of public accommodation held to provide an exclusive and adequate remedy, barring equitable relief.
8 Hastings L. J. 220 (1957).
33 N. Dak. L. Rev. 116 (1957).
105 U. Pa. L. Rev. 115 (1956).

In re Girard's Estate, 127 A.2d 287, 1 Race Rel. L. Rep. 340 (Pa. 1956). City's operation of segregated school as trustee of charitable trust is not violative of the Fourteenth Amendment.
3 Wayne L. Rev. 143 (1957).

Michel v. Louisiana; Poret v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 114, 1 Race Rel. L. Rep. 263 (1955). Exclusion of Negroes from grand jury—right to claim denial of due process waived by failure to raise timely objection.
1956 U. Ill. L. F. 497.

Tate v. Department of Conservation and Development, 133 F.Supp. 53, 1 Race Rel. L. Rep. 171 (E.D. Va. 1955), *aff'd,* 231 F.2d 615, 1 Race Rel. L. Rep. 530 (4th Cir. 1956). Lease of state park must not permit direct or indirect racial discrimination.
3 How. L. J. 131 (1957).

Williams v. Georgia, 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed. 1161, 1 Race Rel. L. Rep. 29 (1955). State criminal appeal remanded upon admission of attorney general that defendant had been deprived of constitutional rights.
5 Buffalo L. Rev. 339 (1956).
69 Harv. L. Rev. 158 (1956).
2 Wayne L. Rev. 144 (1956).

Non-Legal Materials

Books and Pamphlets

Barton, Rebecca Chalmers, *Our Human Rights.* Washington, D.C., Public Affairs Press, 1955. Pp. 102.

The story of the Governor's Commission on Human Rights in Wisconsin, told by its executive director, relating the work of the Commission since its organization in 1945 as a voluntary group.

Blake, Aldrich, *The Civil Rights Revolution.* Laguna Beach, Calif., 1955. Pp. 112. $1.00.
An article asserting that the real issue behind the civil rights controversy is "Free Society v. Statism," arguing that the "civil-righters" are trying to force integration in violation of an individual's right to choose between his associates.

Bobs, Paul Darcy, *Deadline.* Macmillan, New York, 1957. Pp. 254. $3.75.
A novel about a Southern newspaper editor's attempt to reach a decision on the segregation question.

Chambers, L. A., *America's Tenth Man.* New York, Twayne Publishers, 1957. Pp. 351. $7.50.
A pictorial review of one tenth of the nation, presenting the Negro contribution to American life today.

Cook, Lloyd and Elaine Cook, *Intergroup Education.* New York, McGraw-Hill Book Co., 1954. Pp. 392. $5.50.
A textbook, using the case study method, to be used in college courses and as a general reference, discussing teachers' and students' problems where minority groups are concerned.

Dollard, John, *Caste and Class in a Southern Town.* New York, Doubleday Anchor Book, (3d ed.) 1957. Pp. 466. $1.25.
A study by a social psychologist of a Southern community, with an analysis of the effects of segregation upon the Negro and white citizens.

Durden, Robert Franklin, *James Shepherd Pike, Republicanism and the American Negro,* 1850-1882. Durham, Duke Univ. Press, 1957. Pp. 249. $5.00.
The biography of James S. Pike, an ardent advocate of anti-slavery during the 1850's, who later violently opposed the ascendency of Negro politicians in the Reconstruction Days.

Franklin, John W., *From Slavery to Freedom: A History of American Negroes.* New York, Alfred A. Knopf, 1956. Pp. 639. $7.50.
A historian reviews the history of the American Negro, from the beginning of the slave trade in Africa to date.

Frazier, E. Franklin, *Black Bourgeoisie.* Glencoe, The Free Press, 1957. Pp. 264. $4.00.
A sociological study of the Negro middle class, and its role in the American economy.

Frazier, E. Franklin, *The Negro in the United States.* New York, The Macmillan Co., (rev. ed.) 1957. Pp. 769. $6.40.
A sociologist reviews the history of the American Negro, with particular emphasis on Negro institutions.

Gittler, Joseph B. (editor), *Understanding Minority Groups.* New York, John Wiley & Sons, 1956. Pp. 139. $3.25.
A compilation of papers presented at the Center for the Study of Group Relations of the University of Rochester in 1955, including papers on Catholics, Negroes, Indians, Jews, Japanese, and Puerto Ricans.

Handlin, Oscar, *Race and Nationality in American Life.* Boston, Little Brown & Co., 1957. Pp. 300. $4.00.
A study of the history of racial prejudice, presenting a historical examination into the causes of prejudice against minority groups in the United States.

Hansen, Carl F., *Miracle of Social Adjustment: Desegregation in the Washington, D.C. Schools.* New York, Anti-defamation League of B'nai B'rith, 1957. Pp. 70. $0.35.
An assistant superintendent in charge of senior high schools in the District of Columbia describes the change from segregated to integrated schools in the Washington, D.C. schools.

Huddleston, Trevor, *Naught for your Comfort.* Garden City, New York, Doubleday & Co., 1956. Pp. 253. $3.75.
An Anglican priest, who spent twelve years in South Africa, examines the highly segregated society and voices his opposition to the racial policies of the government.

Kilpatrick, James Jackson, *The Sovereign States.* Chicago, Henry Regnery Co., 1957. Pp. 347. $5.00.
A collection of historical data, marshalled to provide strong support for states' rights, including the right to use interposition.

Price, Hugh D., *The Negro and Southern Politics.* New York, New York Univ. Press, 1957. Pp. 133. $5.00.
A study of the development of Negro voting habits, including registration, campaigning, etc., in Florida, after the decision of the United States Supreme Court in *Smith v. Allwright.*

Rowan, Carl T., *Go South to Sorrow.* New York, Random House, 1957. Pp. 246. $3.50.
A Negro journalist appraises and comments on the progress of school integration in the South since the *School Segregation Cases.*

Sampson, Anthony, *Drum.* Boston, Houghton Mifflin Co., 1957. Pp. 256. $3.50.
A description of the conditions in South Africa, with particular emphasis on the "colour bar," as the white editor of an African magazine, *Drum,* found them.

Stampp, Kenneth M., *The Peculiar Institution: Slavery in the Ante-Bellum South.* New York, Alfred Knopf, 1956. Pp. 435. $5.75.
An analysis from family records, legislative petitions, legal codes, court records, etc., of the institution of slavery, pointing out the problems which have survived and are with us today in the segregation issue.

The Race Question in Modern Science. New York, William Morrow & Co., (UNESCO), 1956. Pp. 373. $5.00.
A collection of nine monographs, exploring the concept of race in various settings.

Racial Integration in Private Residential Neighborhoods in Connecticut. Connecticut Commission on Civil Rights, Hartford, 1957.
A study on racial integration in private residential districts, reporting the experience of 219 Negro families in purchasing and adjusting in a white neighborhood.

Racial Integration in Public Housing Projects in Connecticut. Connecticut Commission on Civil Rights, Hartford, 1956. Pp. 72.
A study on racial integration in 72 public housing projects located in towns having 500 or more Negroes in their population.

Periodical Articles

A Symposium on Civil Rights, 16 The Reporter [No. 13] 8-15 (June 27, 1957).
A symposium containing the following articles:
Ascoli, Max, *The Segregated Ballot Box,* 8.
Gamarchian, Edward, *A Report from the South on the Negro Voter,* 9-12.
Murphy, Walter F., *Some Strange New Converts to the Cause of Civil Rights,* 13-14.
Long, Stuart, *White Supremacy and the 'Filibusteros',* 15.

Symposium, *Integration: The South's Historic Problem,* 32 Cur. Hist. 257-302 (1957).
A symposium containing the following articles:
Handlin, Oscar, *Desegregation in Perspective,* 257-60.
Grautham, Dewey W., Jr., *The One-Party South,* 261-66.
Mitchell, Broadus, *Economics in the South,* 267-72.
Tindall, George B., *Problems of the Southern Schools,* 273-77.
Woodward, C. Vann, *The Disturbed Southerners,* 278-82.
Wilkins, Roy, *Desegregation North and South,* 283-89.
Thompson, Carol L. and Joan Burkon, *The Separate But Equal Doctrine,* 289-300.
Prejudice in America: Optomistic Views, 301-02.

Amerman, Helen E., *Perspective for Evaluating Intergroup Relations in a Public School System,* 26 J. Negro Educ. 108-20 (1957).
A study of relations between minority and dominant groups in an integrated school system.

Boyle, K., *So Slowly We Move,* 184 Nation 390-93 (1957).
A discussion of discrimination against Negroes in the State of Connecticut.

Brisbane, Robert, *Interposition: Theory and Fact,* 17 Atlanta U. Phylon Q. 12-16 (1956).
A discussion of the historical background of interposition.

Byrnes, James F. *Race Relations are Worsening,* 42 U.S. News & World Reports [No. 8] 110-14 (Feb. 22, 1957).
An address by former Associate Justice James F. Byrnes, delivered before the Illinois State Bar Association (February 9, 1957), in which he discusses and criticizes the *School Segregation Cases.*

Demerath, Nick J., *Desegregation, Education and the South's Future,* 18 Atlanta U. Phylon Q. 43-49 (1957).
A review of social-economic changes in the South, with reference to desegregation in that area, and a prediction of the manner in which these changes will affect Southern desegregation in the future.

Dyheman, W., and J. Stokely, *Failure of a Hate*

Mission: J. Kasper in the South, 184 Nation 342-44 (1957).
A discussion of the attitude of the South toward segregationist John Kasper, analyzing his failure to win the South to his cause.

Fowler, Grady, *Southern White Citizens and the Supreme Court,* 18 Atlanta U. Phylon Q. 59-68 (1957).
Arguments against the various protests made against the Supreme Court because of the *School Segregatin Cases.*

Guess, William Francis, *South Carolina's Incurable Aristocrats,* 214 Harper's [No. 1281] 44-48 (Feb. 1957).
An article discussing the aristocracy of the South, as evidenced in South Carolina, and urging that the class system in which Southerners believe is their "unspoken case" against desegregation.

Long, Howard H., *The Relative Learning Capacities of Negroes and Whites,* 26 J. Negro Educ. 121-34 (1957).
An answer to an article written by Frank C. McGurk, "A Scientist's Report on Race Differences," (see Bibliography, 2 Race Rel. L. Rep. 291), in which the author rejects McGurk's conclusion that Negroes are below the whites in capacity for education.

MacKenzie, Norman, *England Gets a Race Problem,* 213 Harper's [No. 1278] 61-65 (Nov. 1956).
A discussion of problems caused in Great Britain by a large immigration of colored people from the West Indies, and the racial problems which this migration has created.

Muse, Benjamin, *When and How the South Will Integrate,* 214 Harper's [No. 1283] 51-55 (April, 1957).
A discussion of the attitudes and conditions which affect racial integration in the South, favoring a gradual approach in the "Black Belt" where the ratio of Negroes to whites is high.

Stephan, A. Stephan, *Population Ratios, Racial Attitudes, and Desegregation,* 26 J. Negro Educ. 22-29 (1957).
A sociological discussion of the effect of the ratio of the Negro to the white population on racial attitudes and desegregation.

Woofter, Thomas J., *Segregation—Voluntary and Involuntary,* 64 Crisis 133-38 (1957).
Adopted from a chapter in a forthcoming book by the author, *Southern Race Progress,* discussing three types of segregation—economic, social or preferential, and "forcible division" decreed by law or custom.

How New York City Tries To Force Mixed Schools, 42 U.S. News & World Reports [No. 8] 45-48 (Feb. 22, 1957).
A report on the methods which New York City school officials are using to mix racially the public schools.

Bibliographies

Heartman Negro Collection, Texas Southern University, Houston, Texas, 1957. A catalogue of books about and by Negroes which are found in the Heartman Negro Collection at the Texas Southern University.

Lask, John, *A Long, Hard Look at the Ghetto: A Critical Summary of Literature By and About Negroes in 1956,* 18 Atlanta U. Phylon Q. 7-24 (1957).
A review of literature published in 1956, adequately described by the title.

Spingarn, Arthur B., *Books by Negro Authors in 1956,* 64 Crisis 76-82 (1957).
A bibliography of books written by Negroes, with descriptive paragraphs, compiled by the president of the NAACP.

CUMULATIVE TABLE OF CASES

VOLUME 2, NUMBERS 1-4

IN THIS LISTING the official style of each case and its citations, if any, appear in *italic* type. The reverse citations are in Roman type.


SIGILLUM UNIVERSITATIS VANDERBILTIS
MDCCCLXXIII.